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**Supreme Court of the United States**

**OCTOBER TERM, 1962**

**No. 142**

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**SCHOOL DISTRICT OF ABINGTON TOWNSHIP,  
PENNSYLVANIA, ET AL., APPELLANTS,**

**vs.**

**EDWARD LEWIS SCHEMP, ET AL.**

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**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF PENNSYLVANIA**

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**FILED MAY 24, 1963**

**PROBABLE JURISDICTION NOTED OCTOBER 8, 1962**

# SUPREME COURT OF THE UNITED STATES

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No. 142

SCHOOL DISTRICT OF ABINGTON TOWNSHIP,  
PENNSYLVANIA, ET AL., APPELLANTS,

vs.

EDWARD LEWIS SCHEMPP, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF PENNSYLVANIA

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[fol. 1]

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

Civil Action No. 24119

**EDWARD LEWIS SCHEMP, SIDNEY GERBER SCHEMP, individually and as parents and natural guardians of ELLORY FRANK SCHEMP, ROGER WADE SCHEMP, DONNA KAY SCHEMP, 2459 Susquehanna Avenue, Roslyn, Montgomery County, Pennsylvania**

**VS.**

**SCHOOL DISTRICT OF ABINGTON TOWNSHIP, PENNSYLVANIA, c/o JAMES F. KOEHLER, 739 Wyndale Avenue, Abington Township, Montgomery County, Pennsylvania; O. H. ENGLISH, 4308 Highland Avenue, Abington Township, Montgomery County, Pennsylvania; EUGENE STULL, 1449 Abington Avenue, Glenside, Montgomery County, Pennsylvania; M. EDWARD NORTHAM, 373 Roberts Avenue, Glenside, Pennsylvania**

COMPLAINT—Filed February 14, 1958

1. These causes of action are brought by the plaintiffs to redress the deprivation, under color of Pennsylvania law, regulation, custom and usage of certain rights, privileges and immunities secured by the Constitution of the United States, as hereinafter more fully set forth and jurisdiction is therefore conferred upon this court under 28 United States Code, Section 1343.

[fol. 2] 2. All of the defendants reside within the Eastern District of Pennsylvania, and venue lies therein by virtue of 28 United States Code, Section 1391.

3. Ellory Frank Schemp, Roger Wade Schemp and Donna Kay Schemp are the minor children of Edward Lewis Schemp and Sidney Gerber Schemp, residing with them at 2459 Susquehanna Avenue, Roslyn, Montgomery County, Pennsylvania.

4. Defendant, O. H. English, resides at 1308 Highland Avenue, Abington Township, Montgomery County, Pennsylvania, and is the Superintendent of Abington Township Schools.

5. The School District of Abington Township is a body corporate, and this action is being brought against it in its corporate capacity under Section 213 of the Act of March 10, 1949, P. L. 30 (24 P. S. §2-213).

6. All of the plaintiffs are of the Unitarian faith, and are members of the Unitarian Church of Germantown, Philadelphia, Pennsylvania.

#### First Count

7. Defendant, Eugene Stull, resides at 1449 Abington Avenue, Glenside, Montgomery County, Pennsylvania, and is the principal of the Abington Senior High School, which is located in Abington Township, Montgomery County, Pennsylvania.

8. Ellory Frank Schempp is a senior student at the Abington Senior High School.

9. In the Abington Senior High School, at the start of each school day, there is a devotional period consisting of the following:

[fol. 3] a. Ten verses of the King James Version of the Holy Bible, either the Old or the New Testament thereof, are read by a student over a public address system which is broadcasted into all of the classrooms, including the one in which Ellory Frank Schempp is a student.

b. Immediately thereafter, the students in the entire school, including Ellory Frank Schempp, are directed over the said public address system, to rise and to say the Lord's Prayer.

10. The aforesaid practices were instituted by the defendants in the Abington Senior High School in the manner stated in September, 1956, and continue to the present time.

11. The aforesaid practice of reading ten verses of the Holy Bible is in effect in Pennsylvania Public Schools pur-

suant to Section 1516 of the Act of March 10, 1949, P. L. 30, as amended by Section 7 of the Act of May 9, 1949, P. L. 939 (24 P. S. 15-1516) which provides that:

"At least ten verses from the Holy Bible shall be read, or caused to be read, without comment, at the opening of each public school on each school day, by the teacher in charge. Provided, That where any teacher has other teachers under and subject to direction, then the teacher exercising such authority shall read the Holy Bible, or cause it to be read, as herein directed. . . ."

12. The defendants have violated and continue to violate the religious conscience and liberties of Ellory Frank Schempp by their enforcement of the statutory requirement of reading the bible in his classroom, and by directing that students say the Lord's Prayer.

[fol. 4] 13. Defendant; School District of Abington Township has authorized the expenditure of funds for the purchase of Holy Bibles in order to carry out the Pennsylvania statutory requirement as hereinbefore set forth.

14. The Pennsylvania statute, Section 1516 of the Public Law 30, Act of March 10, 1949, P. L. 30, as amended, and the practices hereinbefore set forth are unconstitutional as being in conflict with the 14th Amendment to the United States Constitution.

Wherefore, Edward Lewis Schempp and Sidney Gerber Schempp, as parents and natural guardians of Ellory Frank Schempp, pray this Court preliminarily, and after trial of this suit, permanently, to enjoin the enforcement, operation and execution of Section 1516 of the Act of March 10, 1949; P. L. 30, as amended, to declare said act unconstitutional; to declare unconstitutional the practices of causing the Holy Bible to be read and of directing the saying of the Lord's Prayer in the Abington Township Senior High School, and to enjoin and declare unconstitutional the expenditure of funds for the purchase of Holy Bibles.

### Second Count

15. Defendant, M. Edward Northam, resides at 373 Roberts Avenue, Glenside, Montgomery County, Pennsylvania, and is the principal of the Huntingdon Junior High

School, which is located in Abington Township, Montgomery County, Pennsylvania.

16. Roger Wade Schempp is an eighth grade student at the Huntingdon Junior High School.

[fol. 5] 17. In the Huntingdon Junior High School, at the start of each school day, and at the direction of the defendants, there is a devotional period consisting of the following:

a. Ten verses of the King James version of the Holy Bible, either the Old or New Testament thereof, are read or caused to be read by the teacher in charge of the classroom in which Roger Wade Schempp is a student.

b. Immediately thereafter, the students in said classroom are directed to rise and to say the Lord's Prayer.

18. Paragraph 11 is incorporated herein by reference thereto as though set forth in full.

19. The defendants have violated and continue to violate the religious conscience and liberties of Roger Wade Schempp by their enforcement of the said statute requiring the reading of the Bible in his classroom, and by directing that students say the Lord's Prayer.

20. Paragraphs 13 and 14 are incorporated herein by reference thereto as though set forth in full.

Wherefore, Roger Wade Schempp, through his parents and natural guardians, Edward Lewis Schempp and Sidney Gerber Schempp, pray this court preliminarily, and after trial of this suit permanently, to enjoin the enforcement, operation and execution of Section 1516 of the Act of March 10, 1949; P. L. 30, as amended, to declare said act unconstitutional; to declare unconstitutional the practices of causing the Holy Bible to be read and of directing the saying of the Lord's Prayer at the Huntingdon Junior High School; [fol. 6] and to enjoin and declare unconstitutional the expenditure of funds for the purchase of Holy Bibles.



### Third Count

21. Donna Kay Schempp is a seventh grade student at the Huntingdon Junior High School.

22. Paragraphs 11, 15, 17 and 20 are incorporated herein by reference thereto as though set forth in full.

23. The defendants have violated and continue to violate the religious conscience and liberties of Donna Kay Schempp by their enforcement of the said statute requiring the reading of the Bible in her classroom and by directing that students say the Lord's Prayer.

Wherefore, Donna Kay Schempp, through her parents and natural guardians, Edward Lewis Schempp and Sidney Gerber Schempp, pray this court preliminarily, and after trial of this suit permanently, to enjoin the enforcement, operation and execution of Section 1516 of the Act of March 10, 1949; P. L. 30, as amended, to declare said act unconstitutional; to declare unconstitutional the practices of causing the Holy Bible to be read and of directing the saying of the Lord's Prayer at the Huntingdon Junior High School; and to enjoin and declare unconstitutional the expenditure of funds for the purchase of Holy Bibles.

### Fourth Count

24. The First, Second and Third Counts are incorporated herein by reference thereto as though set forth in full.

[fol. 7] 25. Edward Lewis Schempp and Sidney Gerber Schempp aver that the aforesaid practices and devotional pattern interfere with their right to give their children a religious education of their own choosing and according to their own beliefs; and that certain beliefs are fostered by such practices which are contradictory to what they have taught and intend to teach their children.

Wherefore, plaintiffs pray this Court preliminarily, and after trial of this suit permanently, to enjoin the enforcement, operation, and execution of Section 1516 of the Act of March 10, 1949, P. L. 30, as amended, to declare said act unconstitutional; to declare as unconstitutional the practice of causing the Holy Bible to be read and of directing the

saying of the Lord's Prayer at the Abington Township Senior High School and Huntingdon Junior High School, and to enjoin and declare unconstitutional the expenditure of funds for the purchase of Holy Bibles.

Henry W. Sawyer, III, Wayland H. Elsbree, Attorneys for Plaintiffs.

[fol. 8]

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

ANSWER—Filed: April 25, 1958

And Now comes School District of Abington Township, Pennsylvania, c/o James F. Koehler, O. H. English, Eugene Stull and M. Edward Northam, defendants above named by their attorney and make answer to the Complaint as follows: stating that wherever in this Answer the defendants allege that they do not know the truth or falsity of an allegation of the plaintiffs or where an allegation is denied for lack of sufficient information, it is the intent and meaning of the defendants that the averment of such lack of knowledge or information shall have the meaning that the defendants are without knowledge or information sufficient to form a belief as to the truth of the corresponding averment of the Complaint.

[fol. 9]

First Defense

1. Denied; except that defendants admit that the exercise of jurisdiction is within the discretion of this Court.
2. It is admitted that all of the defendants reside within the Eastern District of Pennsylvania.
3. Admitted.
4. Admitted.
5. Admitted.

6. Denied for lack of sufficient information.

7. Admitted.

8. Admitted.

9. Denied; except that defendants admit that in the Abington Senior High School prior to the commencement of classes ten verses of the King James Version of the Holy Bible, either the Old or the New Testament thereof, are read without comment by a student or a teacher over a public address system which is broadcast into all of the classrooms, including the one in which Ellory Frank Schempp is a student, and defendants further admit that immediately after such reading the students in the entire school, including Ellory Frank Schempp, rise and may, if they so desire, say the Lord's Prayer.

10. Denied; except that defendants admit that the practices set forth in paragraph 9 of this Answer were in operation by the defendants in the Abington Senior High School during September 1956 and continue to the present time.

11. Admitted.

[fol.10] 12. Denied.

13. Denied; except that defendants admit that both the Abington Senior High School and the Huntingdon Junior High School possess, among the many books used by them for educational purposes, King James Versions of the Holy Bible, some of which may have been purchased with funds of the School District of Abington Township, the amounts paid for such Holy Bibles being negligible.

14. Denied.

15. Admitted.

16. Admitted.

17. Denied; except that defendants admit that in the Huntingdon Junior High School, prior to the commencement of classes each day, ten verses of the King James Version of the Holy Bible, either the Old or the New Testament thereof, are read without comment or caused to be

read without comment by the teacher in charge of the classroom in which Roger Wade Schempp is a student; and defendants further admit that immediately thereafter the students in said classroom rise, and may, if they so desire, say the Lord's Prayer.

18. Admitted.

19. Denied.

20. Defendants incorporate by reference paragraphs 13 and 14 of this Answer as though set forth in full.

21. Admitted.

{fol. 11} 22. Defendants incorporate by reference paragraphs 11, 15, 17 and 20 of this Answer as though set forth in full.

23. Denied.

24. Defendants incorporate by reference paragraphs 7 to 23 inclusive of this Answer as though set forth in full.

25. Denied.

### Second Defense

The exercise of jurisdiction by this Court is within the discretion of this Court since the Supreme Court of the Commonwealth of Pennsylvania has neither interpreted nor determined the validity of Section 1516 of the Act of the Commonwealth of Pennsylvania of March 10, 1949, P.L. 30, as amended by Section 7 of the Act of May 9, 1949, P.L. 939 (24 PS § 15-1516), which is the statute that plaintiffs seek to enjoin and have declared unconstitutional.

### Third Defense

The Complaint fails to state a claim against defendants upon which relief can be granted in that no violation of any rights, privileges or immunities secured by the Constitution of the United States or otherwise, is set forth.

Wherefore, defendants ask that the Complaint be dismissed at plaintiffs' cost.

C. Brewster Rhoads, Attorney for Defendants.

[fol. 12]

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

**Excerpts From Transcript of Trial—August 5, 1958**

Philadelphia, Pa.

[fol. 13] - Before Hon. John Biggs, Jr., Chief Judge, Third Judicial District, Hon. C. William Kraft, Jr., District Court Judge, Hon. William H. Kirkpatrick, District Court Judge.

APPEARANCES

Present: Henry W. Sawyer, 3rd, Esq., and Wayland H. Elsbree, Esq., for the Plaintiffs.

C. Brewster Rhoads, Esq., Percival R. Rieder, Esq., Philip H. Ward, Esq., and Sidney L. Wickenhaver, Esq., for the Defendants.

Thomas D. McBride, Esq., Attorney General of the Commonwealth of Pennsylvania, Harry J. Rubin, Esq., and Lois G. Forer, Esq., Assistant Attorneys General, for the Commonwealth of Pennsylvania.

[fol. 20] Mr. Sawyer: I will call as my first witness Ellory Schempp.

ELLORY FRANK SCHEMP, having been duly sworn, was examined and testified as follows:

[fol. 21] Direct examination.

By Mr. Sawyer:

Q. Ellory, are you through your father one of the plaintiffs in this case?

A. Yes, I am.

Q. What is your age?

A. Eighteen.

Q. Did you attend the Roslyn Elementary School?

A. I did.

Q. Did you attend the Abington Junior High School?

A. Yes.

Q. And did you attend the Abington Senior High School?

A. Yes.

Q. And are you still a student at the Abington Senior High School?

A. I graduated last June.

Q. Now, up to the 10th grade, Ellory, was there Bible reading in your classroom?

A. Yes, there was.

Q. And—

Mr. Rhoads: If Your Honors please, may I register a formal objection to any further testimony from this particular witness on the ground that he has now graduated from the school and that, therefore, any issue regarding the constitutionality of the statute in question is, of course, [fol. 22] moot as to him.

Judge Biggs: Mr. Rhoads, the Court will reserve ruling on your motion and if we deem the evidence in total is irrelevant, or in part irrelevant, we will strike out the irrelevance.

Mr. Rhoads: Thank you, sir.

By Mr. Sawyer: \*

Q. Now, Ellory, will you tell the time, the place and the manner of that reading of the Bible, and what Bible it was up to your time, up to the 10th grade that you were in school.

A. The teacher would usually at the beginning of the year give the Bible reading over to the students, such that it was read by the students in rotation.

Q. And who selected the verses to be read?

A. The children.

Q. And what Bible, if you know, was it that was read?

A. The King James version.

Q. Now, was there a change in that practice in the 11th and 12th grades?



A. There was inasmuch as that we had a new high school and a centralized P. A. system was installed, therefore, the Bible was read over this P. A. system.

Mr. Rhoads: Ellory, will you be good enough to talk a little more slowly, sir; it would help me a good deal.  
[fol. 23] The Witness: O.K.

Mr. Rhoads: I sometimes don't quite get what you say.

Mr. Sawyer: Do you want that answer reread?

Mr. Rhoads: No, just slowly.

By Mr. Sawyer:

Q. By whom was the reading done over the P. A. system?

A. The P. A. system was run, shall we say, by a special class of the high school which was known as the Radio and Television Workshop. This was a regular school class and the members of this class—

Judge Biggs: Just a little bit more slowly, Ellory.

The Witness: —were responsible for reading the announcements and taking care of Bible reading, etc.

By Mr. Sawyer:

Q. Now, will you describe for us precisely what happened upon your arrival in school in the morning and where you went?

A. Late bell was at 8:15; we went to our home rooms and approximately 8:20 a few opening bars of music would be played in order to gain the students' attention and following that immediately a student would announce over the P. A. system that a certain verse of the Bible was to be [fol. 24] read. He would immediately proceed to read this verse and upon finishing he would say would the students please rise and repeat the Lord's Prayer.

By Judge Biggs:

Q. Did you say "home room"?

A. Home room is the name of it.

Q. That is you would each go to your respective classrooms, which were your home, so to speak, classrooms?

A. That's right.

Judge Biggs: Thank you.

By Judge Kraft:

Q. By "P.A." as you have used the term, I assume you mean public address system—

A. I do.

Q. —in which the announcements came over some loud speaker from a central source.

A. That's true.

By Mr. Sawyer:

Q. Now, what is this exercise known as?

A. Morning devotions.

Q. And during the reading of the Bible what was the demeanor required of the students by the teacher in the home room?

Mr. Rhoads: That is objected to, sir. I have no objection to a description but for the question to include the [fol. 25] word "required." I think calls somewhat for a conclusion, and I think in view of the fact that we are dealing with semantics in many cases—

Judge Biggs: I think the objection should be sustained. Rephrase the question.

Mr. Rhoads: Thank you, sir.

By Mr. Sawyer:

Q. Will you describe the demeanor and deportment of the students during the reading of the Bible?

A. Attention was asked and I would say almost demanded.

Mr. Rhoads: I object to the last and ask that it be stricken out, sir.

The Court: Just a moment, please.

The Court is of the view that the witness can state what the teachers told the students in respect to their attitude or what their attitude should be. We think the objection

should be sustained to the question. We order it stricken out and you will re-ask, rephrase the question.

Mr. Sawyer: Yes, Your Honor.

By Mr. Sawyer:

Q. Was there ever an occasion, Ellory, when the teacher gave any directive to the class as to their deportment or conduct during the reading of the Lord's Prayer?

A. Yes, there was.

[fol. 26] Q. And what was that directive, if any?

A. I have frequently heard teachers say to the class to be quiet or to pay attention, as the case required.

Q. And during the recitation of the Lord's Prayer was there any directive given by the teachers or any of them to the students on any occasion?

A. Not specifically, no.

Q. Now, did there come a time when you objected to the reading of the King James version of the Bible and, if so, will you tell us when it was and under what circumstances.

A. In late November of 1956, I had over a period of time been thinking about the matter and had come to feel that it had been, the compulsory reading of the King James version of the Bible was a infringement upon my right to think and believe religiously as I wanted to, and at this time I brought a copy of the Koran into class and while the Bible was being read I read this, and at the time that the rest of the students rose to repeat the Lord's Prayer I remained seated and continued reading the Koran.

By Mr. Rhoads:

Q. Reading the what?

A. Koran.

Judge Biggs: Koran, K-o-r-a-n.

By Mr. Sawyer:

[fol. 27] Q. Now, before we pursue what happened as a result of that, Ellory, let me ask you: What were the features of the religious conscience and thought to which you

objected in respect to the reading of the King James version?

A. I felt that, well, on two points. First of all, I felt that it was a clear violation of the separation of church and state, and that the Bible reading was a religious practice being condoned and forced by the state, and I objected on that point, and also on the grounds of my own personal feelings of religion, I do not believe in the Bible literally and I felt that being read as it was in class it suggested that it was to be taken literally.

Q. Well, let me ask you this at this point: What is your religious affiliation?

A. Unitarian.

Q. And—

Mr. Rhoads: If Your Honors please, I understand that, of course, particularly this last bit of testimony is all subject to my general objection—

Judge Biggs: Yes.

Mr. Rhoads: —sir, so that I won't be—

Judge Biggs: The Court understands that all of this witness's testimony goes to, your general objection goes to all of this witness's testimony.

[Feb. 28] Mr. Rhoads: Thank you. Because I thought this latter was particularly within the scope of my earlier objection, sir. Thank you.

By Mr. Sawyer:

Q. Could you give for the benefit of the Court examples of matter contained in the King James version with which you disagree or with which you take exception from the standpoint of conscience?

Mr. Rhoads: This, sir, I think is objectionable on the further ground, sir, I don't think that the picking out by this witness of individual excerpts from the King James version and then parsing them as an expert before this Court is the type of evidence to warrant hearing.

Mr. Sawyer: Does Your Honor wish to hear me on that point?

Judge Biggs: Yes.

Mr. Sawyer: It seems to me, Your Honor, that we will need to remember as we progress with this case that there are obviously in this kind of case going to be a number of types of evidence which would be quite inconceivable in an ordinary issue. Now, the issue here, which I am developing, is the religious conscience of this particular individual, and it seems to me highly germane to know what there is in this version of the Bible which is contrary to his religious beliefs, if anything.

[fol. 29] Judge Biggs: I think we will admit this testimony subject to the ruling that the Court will strike it out if it deems it irrelevant. All three of us are inclined somewhat to regard it as irrelevant. We don't think it ought to be pursued too far.

Our point of view, so it may be explicable to counsel, is simply this: Suppose he doesn't like the King James version; suppose he does. The main point of this case is that the witness, in effect, takes the position there should be a separation of the powers of church and state. That's true whether he liked the King James version or whether it was some other religious book which was being read. However, since this case may well go to the Supreme Court, we think that probably this should be included in the record at this point, subject to the motion to strike.

We will ask you, Mr. Sawyer, not to pursue it too far.

Mr. Sawyer: Your Honor, I shall abide by your ruling. I'd like to say this: I was prepared to pursue it at considerable length. I was prepared to, both with this witness and his father in particular, to develop in a rather full fashion the particularities of religious doctrine to which they objected because on this thought, Your Honor, that, I quite agree, in fact we probably are the ones who most strongly [fol. 30] assert that it is totally sufficient if there is an objection whether or not we develop particular aspects, but it seemed to me at least that it would be helpful to the Court to see the full dimension of this problem if these points of differences and religious conviction were brought out.

Now, in deference to Your Honors' ruling, I will curtail that in both the case of Ellory and his father. If I may be permitted merely to suggest the scope of that kind of disagreement—

Judge Biggs: Well, now, suppose you begin and see how far we think you should go.

Mr. Sawyer: Let me suggest this, if I will, and Your Honor, I will withdraw that question if I may and I will shorten it by asking specific questions of doctrine which the witness will perhaps answer simply yes or no. That will be shorter.

Judge Kirkpatrick: Mr. Sawyer, don't you think you have just as good a case if this witness said, "Yes, I believe every word of the King James version. I believe it is literally true, every word of it. I think it should not be read in the schools because it breaks down the separation between church and state." Wouldn't your case be just as good?

Mr. Sawyer: We'd have one of the points, Your Honor, I think, and not the other. I think the case has got two [Vol. 31] points. One is the, referring to the establishment clause, arguing for the complete wall, but the other one is that not only may the state not favor all religion over no religion but it may not also favor one sect over another sect. That second portion, it seems to me, you must have some proof that the practice involved is sectarian.

Judge Kraft: But is this witness qualified then to appear to do what you apparently want him to do, and that is to testify as an expert in the interpretation of it?

Mr. Sawyer: No, sir.

Judge Kraft: The Bible itself or the different versions of the Bible are themselves expressly indicative of their differences.

Mr. Sawyer: Well, I certainly do not purport to have him testify as an expert. He is speaking only from his standpoint of his own religious belief. I will offer experts in the course of this hearing. But this witness is only to testify as to his own religious belief and the way in which—in other words; it also has to do with whether we have, it seems to me, a justiciable controversy. Do we have a controversy here in which someone's freedom of conscience is really offended? That may have a possible bearing in some cases. And I also anticipate from the pretrial conference, [Vol. 32] and that is what it is for, I think, so that we know our respective positions, that Mr. Rhoads will argue that



this is non-sectarian, that it is after all not offensive to most people. I mean I think that was the gist of one of his points. So that if I gathered that incorrectly I am sure Mr. Rhoads will correct me. But I think that was one of the concepts of the defense which we developed, Judge Biggs, during the pretrial conference.

I will go very slightly—

Judge Biggs: Just a minute.

Mr. Sawyer: Oh, excuse me.

Judge Biggs: Will you proceed, Mr. Sawyer, along the lines indicated. We think that you are entitled perhaps, subject to our subsequent determination, to develop the subjective attitude of this witness toward these particular things which were done in this school while he was there as it affected his individual conscience.

Mr. Sawyer: Yes, sir.

Mr. Rhoads: Will Your Honor hear me just a moment?

That I take it, sir is not quite the thrust of the questioning of Mr. Sawyer. Mr. Sawyer is now attempting to point out that there are certain phases of actual doctrinaire belief [fol. 33] in which this witness differs from what he conceives to be the teaching, if you will, of the King James version. He says that the basis of that is to establish sectarianism. I suggest, sir, that you don't establish the constitutional fact of sectarianism by simply having a witness get on the stand, whether in expressing his conscience or otherwise, and saying I don't believe in certain things that happened to be read. That doesn't prove the objective of Mr. Sawyer's point.

Judge Biggs: I think probably you are correct.

Mr. Rhoads: Thank you, sir.

Judge Biggs: Let's see what the questions are and rule on them as we go along.

Mr. Rhoads: Thank you, sir.

By Mr. Sawyer:

Q. Mr. Schempp, as a Unitarian—strike that.

Mr. Schempp, do you believe in the divinity of Christ?

A. I do not.

Q. Were you read in the course of your instruction at Abington High School material from the Bible which asserted the divinity of Christ?

A. Yes, sir.

Q. Do you believe in the Immaculate Conception?

A. No.

[fol. 34] Q. Were you read material during the course of your time at Abington High School which asserted the truth of the Immaculate Conception?

A. There was.

Mr. Rhoads: Excuse me, may I ask one question?

By Mr. Rhoads:

Q. Is this all from the ten-verse reading of the Bible in the morning that you are now speaking, Ellory?

A. At one time or another, yes.

Q. But it all comes from those readings; is that correct?

A. Yes.

By Mr. Sawyer:

Q. Do you believe in God?

A. Yes.

Q. Do you believe in an anthropomorphic God?

A. No.

Q. Were you read material from the King James version during your time in school which asserted the concept of an anthropomorphic God?

A. Yes.

Q. Do you believe in the concept of the Trinity?

A. No.

[fol. 35] Q. Were you read material from the King James version during your time at Abington which asserted the truth of the concept of the Trinity?

A. I believe so.

Q. Now, Ellory, to return to the occasion on which you—

Mr. Rhoads: If Your Honors please, I assume that you do not wish me to move to strike at this time. It is all subject to my objection.

Judge Biggs: All subject to your motion.

Mr. Rhoads: Thank you, sir.

Mr. Sawyer: That, Your Honor, was a curtailed version

of what I had intended to go into but I think it brings out the scope.

By Mr. Sawyer:

Q. Now, what happened, Ellory, on the occasion in which you did not participate in the reading of the King James version and did not stand during the reading of the Lord's Prayer? What took place thereafter?

Mr. Rhoads: Now, if Your Honors please, in order that the record may be clear, may I have the precise time that this occasion, in this circumstance—

Judge Biggs: Designate the time.

By Mr. Sawyer:

Q. Yes, repeat that time. I interrupted you in that part of your version. You should repeat that incident and when it happened.

[fol. 36] A. It was in late November of 1956, in the morning devotional period, I brought a copy of the Koran and read it during the Bible reading.

By Judge Kirkpatrick:

Q. You mean read it aloud?

A. Read it to myself. And then as the rest of the class stood up for the Lord's Prayer I remained seated and continued reading it.

By Mr. Sawyer:

Q. And what happened?

A. Well, soon thereafter the home room teacher came to my desk and said that hereafter I should stand for the Lord's Prayer. I replied to him that I do not feel that I could do this in keeping with my religious conscience and asked that I, or said that I thought I should be excused from the morning devotions.

Q. May I interrupt you, please. Just one question, Your Honor, to return to a doctrinal point, just one.

Ellory, do you believe in your own conscience in the concept of petitional prayer?

A. I do not.

Q. Now, you continue.

Judge Biggs: We take it that your objection goes to the question.

[fol. 37] Mr. Rhoads: Yes, Your Honor. I am deliberately, sir, not objecting constantly because I understand that you would prefer that I shouldn't do so; that I may have the opportunity to renew my objection, motions to strike in due course or at the time of argument.

Judge Biggs: Even if you don't the Court will treat them as if they were renewed and will examine the pertinency of the questions and the answers.

Do we have an answer to that question? I am not sure I got it.

Mr. Sawyer: Will you read the question, Mr. Stenographer, please.

(The reporter read as follows:)

"Q. Ellory, do you believe in your own conscience in the concept of petitional prayer?"

"A. I do not.

"Q. Now, you continue."

By Mr. Sawyer:

Q. Will you continue with the event that you were describing.

A. Some discussion ensued between myself and my home room teacher as to matters of—

Judge Biggs: Don't talk quite so fast.

The Witness: —as to matters of individual religions and at the end of this discussion he told me that I should [fol. 38] go down and see the principal of the high school.

By Mr. Sawyer:

Q. And did you do that?

A. I did that. The full principal was absent and so instead I saw the vice-principal and—

Q. What is his name?

A. Mr. Peck. And we discussed the matter there to

some, for some time without much conclusion being reached, and at the end of this time the assistant principal suggested that I go down and see the guidance counsellor of the high school, which I did.

Q. What transpired with the guidance counsellor?

A. Well, further discussions—

Mr. Rhoads: May we have his name, please.

By Mr. Sawyer:

Q. Yes, the name of the guidance counsellor?

A. Miss Brennan. Further discussion ensued which was not too relevant to the, to my, what I had done, merely matters of social custom and how they related to the religious principles of various people, and at the end of this time I went back to my classes. There had been no conclusion reached at any time. It was just discussion and that is about all.

[fol. 39] Q. And was there any other event that took place subsequent to that, and if so what was it?

A. Oh, yes. My guidance counsellor did suggest that I come down to the guidance office in the mornings instead of going through with the regular practice of morning devotion, which I did for the rest of the year.

Q. And how long did you continue to do that?

A. Until the end of my school year, '56-'57.

Q. And did that practice continue during your senior year?

A. At the beginning of my senior year I asked my new home room teacher if I could not be excused from morning devotions.

Mr. Rhoads: May we have her name, please?

The Witness: Miss Lucas. She immediately sent me to the assistant principal again, whose name—Mr. Karem, and this was on a Friday, September 13, I believe. We discussed the matter there to some extent and he felt at this time that it would be all right if I went down to the auditorium—

Mr. Rhoads: If Your Honors please, I ask that the witness not characterize the gentleman's feelings but tell us just exactly what happened.

Judge Kirkpatrick: Doesn't it mean the same thing? I [fol. 40] mean it is just a short—I don't think there is any use of that objection.

The Witness: He said that I could go to the auditorium instead of sitting through morning devotions.

On Monday the 16th, before classes began, I received a notice that I should report to him again, and this time he told me that he had decided that I would not go to the auditorium and that I should remain in the home room and go through with the morning devotions as the rest of the students did.

By Mr. Sawyer:

Q. And did you do that, sir?

A. I did that. He had stated that I must do it in order to show respect and because and simply to obey a school rule; that matters of conscience and religion were not as important here as merely conforming to the school rule.

Q. And thereafter did you conform to the school rule in all respects or was there an occasion when you—well, did you conform to it in all respects?

A. For the next several days I sat in class but did not pay strict attention and, in fact, was busy doing other work, homework perhaps or maybe I was reading, I don't recall.

Q. And what happened as a result of that?

[fol. 41] A. And on Wednesday the 18th the assistant principal again contacted me and told me that I must show complete respect by not doing any other work during the morning devotional period and that I must pay attention.

Q. And did you comply with that order?

A. I complied with that for the remainder of the year.

Q. And being in compliance with that order, was there any other further incident with regard to the school authorities or did that close the issue?

A. It closed the issue pretty much.

Mr. Sawyer: Will Your Honors indulge me just one moment?

Judge Biggs: Yes.

Mr. Sawyer: Cross-examine.



Cross examination.

By Mr. Rhoads:

Q. Ellory, you had these experiences in 1956 and seven with your home teachers that you have just described; is that right?

A. That's true.

Q. Any other experiences?

A. Well, with my fellow students. We had been discussing related issues but not with the administration.

Q. I mean with the school authorities.

[fol. 42] A. None, no.

Q. So that you have told us all that you have to tell with reference to anything that happened between you and the school authorities?

A. As I remember.

Q. As you remember. Now, on September 13 and 18 in these discussions which you had with your home teacher, or others, the upshot of it was that you were requested to return to the devotional services in the morning and pay attention; is that correct?

A. That's true.

Q. And you did pay attention?

A. Yes.

Q. Now, formerly, that is in 1956, differing as you did with the exercises at the opening of school, you deliberately did not pay attention, did you?

A. That's true.

Q. And you manifested that deliberate failure to pay attention by reading something else openly during the course of the devotional services; is that correct?

A. That's true.

Q. And was that a method of your expression of your conscience?

A. That was a method of expressing that I did not agree with their practice; that's true.

[fol. 43] Q. Now, you reported, I suppose, the circumstances of the September 13-18, 1956, events to your parents, did you not?

A. I did.

Q. Did your parents come to see anybody at the Abington Schools?

A. They did not.

Q. Did your parents request that you be excused from attendance at any of these morning exercises?

A. Not to my knowledge.

Q. Now, when did you enter the Abington Schools, Ellory?

A. Well, the Abington School District and Roslyn Elementary School, 1948 I believe.

Q. And you are now eighteen?

A. That's true.

Q. And it was approximately less than two years ago that you felt that there was something entirely foreign to your conscience, let me put it that way, in listening to those devotional exercises, as you have just described them, in the morning?

A. That's true.

Q. And up to November of 1956 you had not felt that way; is that correct?

A. No, that's not correct. I had been thinking about it [fol. 44] for some time; I had not decided what I could do or should do until that time.

Q. And did you talk to your parents about it before you talked to any of the teachers?

A. Several times.

Q. Yes. Now, Ellory, you are a Unitarian, are you not?

A. That's true.

Q. You graduated this last spring?

A. True.

Q. Have you any sisters or brothers?

A. One brother and one sister.

Q. Now, did you report the fact of your difference with this practice in Abington to anyone other than your parents?

A. Yes. We had, my fellow students and I had discussed them on several occasions.

Q. Now, how about others who were not connected with the Abington School?

A. I believe my parents had discussed it with friends and relatives.

Q. Now, did you write any letters to anybody about this practice up in Abington?

Mr. Sawyer: Your Honor, I would like to ask Mr. Rhoads to approach at side bar.

Judge Biggs: I am not sure to what—I realize this is [fol. 45] cross-examination; I am sure we are prepared to allow considerable latitude.

Are these questions directed to the good faith of the witness?

Mr. Rhoads: No, sir, these questions are directed primarily to the question of the witness's conscience, sir. They have to do with certain correspondence which this witness had with the American Civil Liberties Union. And in view of the fact that he spoke about an occasion in 1956, I thought it would be appropriate for the Court to know exactly what this witness said in 1956 in order that the record may be clear.

Judge Biggs: You are prepared to show what he—

Mr. Rhoads: I have the copies of the letters here, sir.

Judge Biggs: Mr. Sawyer, have you any—

Mr. Sawyer: Your Honor, Mr. Rhoads in so mentioning this transgresses an express understanding which he and I had and I am most surprised that he has done so.

Judge Biggs: And where, Mr. Sawyer—I don't recall any of this at the pretrial.

Mr. Sawyer: No, sir, it was between Mr. Rhoads and myself and his office.

[fol. 46] Now, Mr. Rhoads asked me if I would submit to him, in fact, he said in lieu of a subpoena, correspondence which, if any, took place between this witness and the American Civil Liberties Union.

I said that it seemed to me that there was, that he had no ground for this whatsoever under subpoena, but since I thought he was quite clearly barking up the wrong tree, I wanted him to see the correspondence with this understanding, and I did. I brought it to his office, with this understanding, that before—it was asked if I would produce it, you see, here, and this was in lieu of that, but before there would be any use of this on his part or reference to

it, that we would have an opportunity to submit this to Your Honor and to see whether or not it was relevant.

Now, the matter has been brought forward, I think it is my understanding, in derogation of that agreement.

In that case, it seems to me, that the correspondence should be examined. I think it's quite irrelevant. It doesn't seem to me it would make a particle of difference whether the American Civil Liberties Union started this case or they didn't.

It so happens, Your Honor, that Mr. Schempp, Ellory Schempp, wrote to the American Civil Liberties Union and [fol. 47] initiated their interest in the matter. In fact, he wrote a number of letters before that organization even evinced any interest in the matter, if it makes any difference. I maintain that it doesn't make any difference, but since it has been brought out I think that it should at least be made clear from the standpoint of none other than public relations and my own position that the initiation came entirely from him, and the letters will so show, and not from any organization.

Now, if the Court thinks it is relevant, I suggest that all of the correspondence which Mr. Rhoads has copies of, which I furnished him under this understanding, that we have an opportunity to discuss in chambers with Your Honor whether such a subpoena was reachable for this material.

Mr. Rhoads: Well, if Your Honors please, may I suggest that it is only, I am sure, on very rare occasions that my good faith in a situation of this kind is challenged, and I don't think Mr. Sawyer means it in the way in which certainly I interpreted it. I told Mr. Sawyer that, of course, I would not use any of his correspondence without giving him a full opportunity in the first instance to register his objection, to object to its relevancy, to discuss it either in open court or with Your Honors in chambers. And I am sure that my question, without presenting a [fol. 48] single document to the witness, clearly is in accordance with my own understanding, and I am now prepared to interrogate the witness regarding a letter, but my friend has had full opportunity, I take it, to object

to the relevancy and the materiality of anything that I may be asking this witness.

Judge Biggs: Mr. Rhoads, I am not at all sure that you are not spending too much time on an issue which is certainly perhaps collateral, but it does seem to me that your questions are in effect directed to the good faith of the witness, to some degree at least; and I say "good faith"—perhaps that is an inappropriate term; let me say the strength of his conscientious belief, directed to that perhaps rather than to the issue of good faith.

It would seem to me that you should limit your questions here to whether or not there was correspondence between the witness and the American Civil Liberties Union. When it comes to the question as to whether or not the letters shall subsequently be admitted, we will take that under advice, and we will also take these questions and their answers subject to a motion to strike.

Mr. Rhoads: I am wondering, sir, whether I might merely have the letters identified by the witness so that at [fol. 49] least we would then—

Judge Biggs: You can introduce them in your case in chief.

Mr. Rhoads: Exactly, sir.

Judge Biggs: Have you any objection to them?

Mr. Sawyer: No, but I don't think there is any—

Judge Kraft: Gentlemen—just a moment, Mr. Sawyer—before we lose track of where we are on this record, it strikes me that your objections were occasioned by a very simple question which, in effect, asked him if he wrote to the American Civil Liberties Union, and that I think is the only question presently pending to this witness.

Mr. Sawyer: Well, I think that is correct, Your Honor, and I object. But the reason I made the further statement was that it seemed to me that I think that this is, this kind of an aspect of the thing is completely irrelevant; it is a red herring, if you will, which hasn't got anything to do with the issue.

Judge Biggs: Well, it may be. The Court is not at the present time describing it, deciding whether or not this be a red herring.

I think the quickest course would be—mind you, we are sitting here without a jury: the Court has complete command of this record.

[fol. 50] I think we will let the question be answered.

Will you answer the question, please.

Read the question to the witness.

Well, let's save time. The question had to do with: Did you have correspondence with the American Civil Liberties—

Mr. Sawyer: I think the question is: Did you write—

By Judge Biggs:

Q. Did you write to the American Civil Liberties Union?

A. I did.

The Court: Yes. Go ahead from there.

Mr. Rhoads: The answer is yes?

The Witness: Yes.

Judge Biggs: He answered yes.

By Mr. Rhoads:

Q. May I ask you, Mr. Schenpp, Ellory, if you please: I show you a photostatic copy of a letter Ellory F. Schenpp signed, November 26, 1956, the American Civil Liberties Union, and ask you whether you wrote that letter.

A. Yes, I did.

Q. Now, I show you a copy of another letter from Spencer Coxe, addressed to you, of December 6, 1956. Did you receive the original of which that letter is a copy?

A. Yes, I did.

[fol. 51] Q. I now show you a photostatic copy of a letter of February 2, 1957, signed Ellory Schenpp, and ask you whether that is the letter which you wrote?

A. True.

Q. I now show you a copy—

Judge Biggs: How many of these are there, Mr. Rhoads?

Mr. Rhoads: There are just three more, sir.

Judge Biggs: Very well, go ahead.



By Mr. Rhoads:

Q. —a copy of a letter of February 8 from Spencer Coxe to yourself and ask you whether you received that.

A. True.

Q. That is '57, is it not?

A. Yes, sir.

Q. The same with March 4, '57?

A. True.

Q. And April 12, '57?

A. Yes.

Mr. Rhoads: I now ask that these letters be marked for identification.

Judge Biggs: Mark them for identification subject to the objection. They are not yet in evidence. And let them be marked as one group for identification.

[fol. 52] (Letter addressed to Mr. Ellory Schempp from Spencer Coxe, dated April 12, 1957; letter addressed to Mr. Ellory F. Schempp from Spencer Coxe, dated March 4, 1957; letter addressed to Mr. Ellory F. Schempp from Spencer Coxe, dated February 8, 1957; letter addressed to Civil Liberties Union from Ellory F. Schempp, dated February 2, 1957; letter addressed to Mr. Ellory F. Schempp from Spencer Coxe, dated December 6, 1956; and letter addressed to American Civil Liberties Union from Ellory F. Schempp, dated November 26, 1956, were marked in a group as Exhibit D-1 for identification.)

Mr. Rhoads: I will not have any further interrogation with reference to those letters.

Judge Biggs: Thank you.

Anything on this side by way of cross-examination?

Mr. Rhoads: No, I meant about these letters.

Judge Biggs: Oh, thank you.

Mr. Rhoads: Will Your Honor indulge me a moment?

Judge Biggs: Yes.

Mr. Rhoads: No further questions.

Judge Biggs: Are there any further questions from that side of the—

Mr. Rhoads: These gentlemen are all my associates.

[fol. 53] Judge Biggs: I see. Thank you.

Anything in rebuttal?

Mr. Sawyer: No, Your Honor; no further questions.

Judge Biggs: Any further questions of this witness?

Thank you very much.

You will stand down, please.

Judge Biggs: Your next witness, Mr. Sawyer.

Mr. Sawyer: Edward Schempp.

EDWARD L. SCHEMP, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Sawyer:

Q. Mr. Schempp, are you the father of Ellory Schempp who just testified?

A. I am.

Q. And do you have other children, sir?

A. Two others who are down there in the front row.

By Judge Biggs:

Q. Those are all you have, aren't they?

A. That's right; three all together.

[fol. 54] Judge Biggs: Thank you.

By Mr. Sawyer:

Q. And are those children students in the public high schools of Abington Township?

A. They are.

Q. Now, have you had occasion to discuss with your children their feelings with regard to the morning devotions which are carried on in the schools of the Township?

A. We have discussed them on numerous occasions.

Q. And from the standpoint of your own religious conscience, sir, do you have objection to the practices that are carried out therein and which have been described here by your son Ellory?

A. Definitely. Ellory has said very much what I would have said myself.

Q. What—

By Judge Biggs:

Q. Very much what he would have said or what you now say yourself? Have your views changed in this matter?

A. No, my views are identical with Ellory's as he gave it here.

Judge Biggs: Thank you.

By Mr. Sawyer:

Q. What are the grounds for your objection to this practice, Mr. Selamp?

[fol. 55] A. The Bible reading in the school, is given by the manner of presentation, the ten verses without comment, is given a degree of authority or devotion or religious significance above normal school authority, in my opinion; and then under that particular atmosphere statements are read from the Bible, from the literal Bible with which I do not agree.

Q. But what would be such statements? Give some examples of statements in the Bible with which you do not agree.

Judge Biggs: The same objection, I take it.

Mr. Rhoads: Yes, sir.

Judge Biggs: We will receive it subject to strike.

The Witness: Well, we have Leviticus where they mention all sorts of blood sacrifices, uncleanness and leprosy. Nobody believes in these things today.

Mr. Rhoads: Objected to, sir, for other reasons, of course.

Judge Biggs: Yes. The objection is overruled subject to a motion to strike.

The Witness: Nobody believes in these things today yet they are in the Bible. And in some parts, some of the lower grades the children are allowed to select verses and they [fol. 56] could just as well pick verses from Leviticus. I don't believe that they would be picked by an adult.

The Old Testament has Jehovah as a God of vengeance. We have—there is a verse sandwiched right in between the Ten Commandments in which "God will visit the sins upon the fourth generation." That has been read in Abington High School.

A human father would not visit the sins upon the children of a fourth generation, in my opinion. That makes God less than man and I do not want my children believing that God is a lesser person than a human father. My concept of God is bigger than that.

We have parts—another part that says something like, "The animal that dies of itself—" or "The meat that dies of itself thou shalt not eat," but then "Thou mayest feed it to the stranger within thy gates." That's nothing—that's quite foreign to my concept of being good and religious and moral. There's many things like that.

By Mr. Sawyer:

Q. And do you attend any church with your children, Mr. Schempp?

A. We attend regularly the Unitarian Church of Germantown.

[fol. 57] Mr. Sawyer: Cross-examine.

Mr. Rhoads: No questions.

Just a minute. Excuse me, just one question.

Judge Biggs: Certainly.

Cross examination.

By Mr. Rhoads:

Q. Mr. Schempp, how long have you been a resident of Abington Township?

A. About 1948 I believe we moved up there, didn't we?

Q. And was that about the time your eldest son Ellory went into school?

A. As we moved up there he automatically went into school.

Q. What is your business, sir?

A. I am an electronic engineer.

Q. Who is the present head of the Abington School System in Abington Township?

A. Dr. English I understand.

Q. You have testified as to the reasons which lead you to disagree with the practice that has been mandated by

the Legislature of Pennsylvania and is in practice in Abington High School, and you have given us your reasons; is that correct?

A. That's right.

Q. Have you ever complained personally to Dr. English?  
[fol. 58] A. I don't think he would have done anything about it.

Q. I am not asking that.

Judge Biggs: Answer the question.

The Witness: No, I have not.

By Mr. Rhoads:

Q. You have not.

Have you ever made any objection such as you have registered here to any person in authority in the School District of Abington Township?

A. No.

Mr. Rhoads: That's all.

Mr. Sawyer: Thank you very much, Mr. Schempp.

Judge Biggs: Just a moment, please.

Mrs. Forer, we see that you are here and we understand that you are a member of the bar of this court, are you not?

Mrs. Forer: Yes.

Judge Biggs: You are a member of this bar?

Mrs. Forer: Yes.

Judge Biggs: Of this court?

Mrs. Forer: Yes.

Judge Biggs: Very well. We only ask this question because we are not sure whether or not you are here on a watching brief or whether you might desire to ask some [fol. 59] questions. Do you or don't you?

Mrs. Forer: No. I at this point—the Attorney General, as you saw, was here, and I think we are all here just to observe, and at this point; so far as I know, the Attorney General is taking no part in the case.

Judge Biggs: All right. To use a phrase of the Society of Friends, if the Spirit should move you and you desire to ask questions, will you rise, please.

Mrs. Forer: Thank you.

Mr. Rhoads: If Your Honors please, as long as that issue has arisen, may I ask that the record show that the Attorney General of Pennsylvania has heretofore been notified, of course, of the pendency of this suit and is fully aware of what is involved therein, as I think Your Honor well knows.

Judge Biggs: Notified by the clerk in accordance with the statute.

Mr. Rhoads: Thank you, sir.

Judge Biggs: Your next witness, please.

Thank you very much. You may stand down, please.

Mr. Sawyer: Will Your Honor indulge me for one moment?

[fol. 60] Judge Biggs: Yes.

Mr. Sawyer: If Your Honor please, I have also to put on very brief testimony from the two younger Schempp children.

Judge Biggs: Very well.

Mr. Sawyer: But I have in the courtroom an expert witness and I think he would be able to finish conveniently this afternoon and, therefore, I would like to put him in even though it may be in a sense out of order because I want to come back to the Schempp family before I finish.

Judge Biggs: You will defer the examination of the two Schempp children then until this witness is concluded?

Mr. Sawyer: Yes, sir, I should like to.

Dr. Grayzel.

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DR. SOLOMON GRAYZEL, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Sawyer:

Q. Dr. Grayzel, would you give us your educational background, please, sir?

A. Well, I—

[fol. 61] Judge Biggs: Doctor, would you please keep your voice up; forget that you have a loud speaker before you. As a matter of fact, this is on a Sound Scriber device.



which is being tested. The court reporter here is also making a record. Speak back so that Mr. Rhoads and the gentlemen at counsel table can hear you. Keep your voice up. We can hear you but I am not sure they can.

The Witness: I will try.

Judge Biggs: Yes.

The Witness: I was graduated from the City College of New York and Columbia University. I went to a Rabbinic school in New York, the Jewish Theological Seminary. I was ordained there, then I received a doctorate of philosophy from the Dropsie College in this city.

By Mr. Sawyer:

Q. And have you specialized in any particular studies in connection with your doctorate, sir?

A. My specialty has been medieval history, specifically medieval Jewish history.

Q. And what writings are they?

Judge Biggs: Just a moment.

By Judge Biggs:

Q. What dates would you call covered by medieval Jewish [fol. 62] history?

A. Why, anything from I should say 300 to the French Revolution, to 1800, thereabouts.

By Judge Kraft:

Q. You are speaking now of what calendar?

A. Of the general calendar, the Christian Era.

By Mr. Sawyer:

Q. And would you tell us what publications, if any, you are the author?

A. I have written a book on The Church and The Jews in the 13th Century, and another one on The History of the Jew.

Q. And what is your present—

Mr. Rhoads: History of the Jew?

The Witness: That's right.

By Mr. Sawyer:

Q. And what is your present employment?

A. I am the Editor of the Jewish Publication Society.

Q. And you are also—are you an ordained rabbi, sir?

A. Yes, yes.

Q. And are you here at this trial representing any particular organization?

A. Well, I should like to make that perfectly clear, if you don't mind. I am here only, speaking only for myself. Neither the Publication Society of which I am the editor [fol. 63] nor any part of the Jewish community here or anywhere in the United States asked me to come here. I speak only and solely for myself.

Q. And in your work as Editor of the Jewish Publication Society are you engaged in any work in connection with the Bible?

A. Well, the Jewish Publication Society published its, or the Jewish— Let me put it this way: It published a translation of the Bible, that is the Jewish Bible, the so-called Old Testament, into English some forty years ago, a copy of which I have here, and we are currently engaged in a re-translation of the Bible into English, utilizing modern, the modern English, I say contemporary English.

Q. Is the Bible that you refer to the one that is already, the older one, not the one that is now in progress, is that known as the Masoretic Text?

A. Yes, it is called the Holy Scriptures. According to the Masoretic Text—

By Judge Biggs:

Q. How do you spell that, please?

A. M-a-s-s-o-r-e-t-i-c. Now, that is a very simple word. It is an Anglicized Hebrew word. It simply means traditional, the text as it was, as it has been handed down from ancient times, literally, without changing a single letter or a vowel.

[fol. 64] By Mr. Sawyer:

Q. Is it an element of importance within the Jewish religion that the precise wording of the Holy Scriptures be exactly unvaried?

A. Yes, it is very important that the Masorah, the Masoretic Text, be adhered to very strictly.

By Judge Biggs:

Q. How do you spell Masorah, please?

A. M-a-s-o-r-a-h. But that applies, of course, only to the Hebrew, you understand that. It has nothing to do with the English translation.

Q. No, I don't follow you. What do you mean? You mean that it's very important that the Hebrew text be exactly the same?

A. That's right.

Q. But it is not important whether or not the English translation of the Hebrew text is the same?

A. Yes, the translation may vary as one person understands the Hebrew text or another understands it. If you compare the King James version, which is also in large measure based upon the original Hebrew text, with our translation, you will find a great many variations because they understood the Hebrew text in one fashion and we understood it in another.

By Mr. Sawyer:

[fol. 65] Q. Would you comment on the differences in what is included, not speaking now of textual or doctrinal differences but differences in what is included in the King James version—strike that, please.

First of all, are you familiar with the King James version of the Bible?

A. Fairly familiar.

Q. Now, will you tell us then the differences in content between the Jewish Bible and the King James version?

Judge Biggs: Just a moment, please.

By Judge Biggs:

Q. First of all, what is an ordained rabbi? Isn't there some other word of art used when a rabbi is instituted in office, rather than "ordained"?

A. I can't think of any.

Q. In other words, an ordained rabbi, the word "ordained" is as appropriate there as an ordained minister in the Episcopal Church?

A. That's right.

Q. It's ordained?

A. That's right.

Q. Not instituted or inducted or anything like that?

A. No, just ordained.

Judge Biggs: Have you finished your endeavor to qualify this witness as an expert?

[fol. 66] Mr. Sawyer: Yes, I offer him as an expert, sir.

Mr. Rhoads: I object to it, sir. I don't think that this witness has in any way qualified himself as an expert, certainly for an answer to the question which has just been presented to him in which he has been asked to point out the differences between certain texts in the King James version and other texts, be they Jewish or otherwise. And I object for the further reason, sir, that it seems to me that there is, that it's no part of this case to have a contrast textually between a Jewish version, a Catholic version and a King James version as such.

The question is a simple one: Whether the reading of the King James version, whatever that is, is contrary to certain specific clauses of the federal and state Constitutions which have been outlined by my friend. We are dealing here with a practice and we can get into, it seems to me, the most abstruse differentiations and classical problems that would bring this record into undue length I think in view of the very simple issue that is involved. I object on the ground that he is not qualified, and for the further reason that the question as asked is not pertinent.

[fol. 67] Judge Biggs: This raises a major issue in the case, gentlemen. It was discussed at pretrial at some length. I don't think any conclusion was reached in respect

to it. My recollection is that I stated that this issue would have to be deferred until the other two judges who would sit with me were present. And I think we will retire to Judge Kirkpatrick's or Judge Kraft's chambers, or my chambers, and consider this matter.

Mr. Sawyer: Does Your Honor mean with—

Judge Biggs: And we would like to have counsel. Suppose, if you be good enough, to come down to my chambers. Will you do that, please, and the Court will stand in recess for at least fifteen minutes, at least until 3:30.

Will counsel come to my chambers, please, and everyone else, we will call back everyone else when we have concluded.

Mr. Rhoads: Does Your Honor object if I bring my associates with me?

Judge Biggs: Of course not. All counsel are invited to come down to my chambers.

(Recessed at 3:13 p. m. and reconvened at 3:40 p. m.)

Mr. Sawyer: Dr. Grayzel, will you take the stand again, please.

Judge Biggs: Now, we understand that Mr. Rhoads [fol. 68] made an objection to the qualification of this witness.

We sustain the objection and give you leave to further qualify the witness.

Mr. Sawyer: Thank you.

DR. SOLOMON GRAYZEL, resumed.

Direct examination (continued).

By Mr. Sawyer:

Q. Dr. Grayzel, you testified that you were a graduate of the Jewish Theological Seminary of America. What kinds of studies are pursued and did you pursue at that institute?

A. Well, the studies involved every phase of Jewish literary and religious life. Speaking in terms of studies, there are, of course, theological studies and there is Hebrew liter-

ature, Bible, Talmud, medieval literature—it is practically interminable.

Q. Is it a theological institute?

A. Yes.

Q. Is it an institute which deals with and specializes in the study of one particular aspect and branch of the general scope of theology?

A. Of Jewish theology, yes.

Q. Jewish theology?

[fol. 69] A. Yes.

Q. And what is meant when you also refer to it as a Rabbinic institute?

A. Well, it would take me some hours to describe the duties, the history of the development of the rabbinate as an institution.

Q. What is it, what is that institution, sir?

A. It is, originally, basically the rabbi is an expert in Jewish lore, in theology, in Bible, and in the literature that developed out of the Bible. He is basically a teacher and a guide of the legal aspects and the theological aspects of Jewish life.

Q. And—

By Judge Kirkpatrick:

Q. Well, you have read and studied the Jewish Holy—

A. —Scriptures.

Q. —Scriptures in the original Hebrew?

A. Yes.

Q. You are familiar with the Hebrew language and you can speak it, I have no doubt.

A. Yes.

Q. And you read and studied the whole of the scriptures in the Hebrew language?

A. Yes. The Hebrew Scriptures in the Hebrew language.  
[fol. 70] yes.

By Mr. Sawyer:

Q. And you said that you got your Ph.D at Dropsie College?

A. That's right.



Q. And what kind of an institution is Dropsie College?

A. Dropsie College is a graduate institution for the further study of research, or rather research in Jewish studies and studies allied with it. For example, at Dropsie College there is studied not only the Hebrew language more profoundly and the Bible more, in more detail but also Arabic, Assyriology, history, anything pertaining to Jewish life and Jewish sources.

Q. And you also testified with regard to a translation, a new translation of the Jewish Holy Scriptures. What have you to do with that and the translation is from what language to what language?

A. Well, as the Editor of the Jewish Publication Society I am part of the Translators Committee. We have a committee of the foremost Jewish scholars in, Bible scholars and very learned rabbis representing the various viewpoints in Judaism, and we translate practically word for word from the Hebrew, naturally, with the aid of all sorts of commentaries in every kind of language and all the versions that preceded ours, but it is primarily on the basis of the Hebrew language.

[fol. 71] Q. And in the course of your studies have you had occasion to read the Bibles of other faiths other than the Jewish faith?

A. Certainly.

Q. What would some of those Bibles have been which you had occasion to read and study?

A. Well, the King James version is, of course, basic for the simple reason that it's a remarkably well done translation for the 16th century, for the Jacobean times. And then, of course, there is the American translation and the most recent revised standard version, which is a reputable piece of work.

Q. Are there Catholic versions which you have also read?

A. Oh, yes, we consult the Catholic versions. But you realize—I don't know whether you would know about it, but from the point of view of the Catholic the important thing is church doctrine, whereas to us the important thing is what the Hebrew of the Bible actually says, regardless of whether we agree with it at the present time doctrinally or not.

Mr. Sawyer: Your Honor, I renew my submission to the Court that Dr. Grayzel is competent to testify as an expert.

Judge Biggs: Any objection?

Mr. Rhoads: I would like to reserve my objection, sir, [fol. 72] but I am sure that Your Honors will hear this witness and give me the privilege of objecting at the proper time if we find that there may be substantive objections as his testimony develops.

Judge Biggs: It is so ordered. Will you proceed.

By Mr. Sawyer:

Q. Now, Dr. Grayzel, are there any books—first of all, is there any general section of the King James version of the Bible which is not to be found in the Jewish Holy Scripture?

A. Our sacred books consist of the three divisions which—we divide the Bible into three parts, the Torah, which is the five books of Moses, the prophetic portion from, I mean the historical books and the Prophets from Joshua down to the end of the prophetic tradition Malachi, and then the sacred writings, including everything else, the Psalms, the Proverbs and all the others down through Chronicles, which this differs considerably from the Christian tradition in the order of the books and in the contents of the Bible.

Q. In the view of the Jewish church do all of the books have equal importance and weight from the standpoint of their religious value?

A. There is a distinction which every Jew makes. The [fol. 73] highest sanctity is ascribed to the five books of Moses.

By Mr. Rhoads:

Q. That is the Torah?

A. The Torah. Lesser, somewhat lesser sanctity is ascribed to the historical and the prophetic books, and least sanctity, though sacred too, naturally, is ascribed to the so-called sacred writings, Psalms and the rest.

May I add this: That in the King James version, of course, the order of the books is completely different, I

mean from a Christian viewpoint understanding, and, besides, there is added the New Testament, which the Jewish Bible naturally does not have at all.

By Mr. Sawyer:

Q. Now, the Jewish Bible, in other words, does not contain the New Testament?

A. No.

Q. Now, what is the position of the Jewish religion regarding the New Testament?

Mr. Rhoads: Now, if Your Honors please, may I here register a little different objection. I do not think that a description of the Jewish tradition has any part in the case which is presently before us.

Judge Biggs: I think the answer to the question would generally be admissible. We will overrule the objection [fol. 74] subject to a motion to strike.

Judge Kirkpatrick: May I ask one question before you leave the Old Testament.

By Judge Kirkpatrick:

Q. Does the King James Old Testament contain any books that are not in the Hebrew Scriptures?

A. The Old Testament, no. The same books are contained in both but in different order.

Judge Kirkpatrick: That is all that I wanted to know. All right, now go ahead with your other question.

The Witness: What is the question, sir?

By Mr. Sawyer:

Q. The question was this: What is the position, the doctrine of the Jewish religion with regard to the New Testament, specifically with regard to the figure known as Jesus Christ?

A. The Jews have, naturally, not believing in the divinity of Jesus, have no place at all for the New Testament or any part of it. They consider it, the writing, I mean the books themselves, each individual book was practically

in every case written by a Jew or a former Jew but it is not part of the Jewish tradition and sometimes certain portions of it are distinctly offensive to Jewish tradition.

Mr. Rhoads: Would it be improper, sir, to possibly ask [fol. 75] the question whether Dr. Grayzel could define for us what he means by "tradition"?

Is that the same thing that we might call faith, a Christian faith, a Jewish faith, a Catholic faith?

Judge Biggs: I think we are getting into rather deep issue here and I think it would be better to reserve that for cross-examination.

Mr. Rhoads: Thank you, sir.

The Witness: I don't mind answering it.

Judge Biggs: I think it is a little bit out of place until you come to cross-examination.

Mr. Rhoads: I beg Your Honors' pardon.

By Mr. Sawyer:

Q. Dr. Grayzel, I will ask you. You said at the end of your last answer that it would be regarded as offensive. How would you describe it, the word "offensive" having connotations both of a religious and non-religious nature, how would you describe it, what would be the words that you describe it from the religious standpoint? What would it be called, the concept of the divinity of Christ?

A. I don't want to step on anybody's toes but the idea of God having a son is, from the viewpoint of Jewish faith, practically blasphemous.

Q. And was that concept, in the view of the Jewish faith [fol. 76] the assertion by Christ of divinity in that sense of the word, the crime of Christ in the view of the Jewish church at the time?

A. If that incident happened, I mean Jesus—

Q. If the incident happened would it have been such assertion?

A. It would have been offensive, yes.

By Judge Biggs:

Q. Would it have been blasphemous?

A. Blasphemous, yes.

By Mr. Sawyer:

Q. Now, are the portions of the Old Testament which in the view of the Jewish religion are imbued with a Christological significance in the King James version.

Mr. Rhoads: What?

The Witness: Christological.

Mr. Sawyer: Christological, yes. Intending to indicate, if I may say—maybe I better ask the doctor what it means.

Judge Biggs: Suppose you ask the doctor.

The Witness: Well, Christological means anything pertaining to Christ, anything pertaining to Jesus. And there are any number of passages in the Jewish Bible, in the Old Testament, which the church interpreted as referring to Jesus. I mean it's quite naturally understandable. For [fol. 77] example, when you speak of—I think of a simple instance—when you speak of “a Scepter shall not depart from Judah,” that in the King James version, I am practically certain, the word “Scepter” would be capitalized because it refers to Jesus, in the Christian tradition or the Christian faith. In our translation I am equally sure it would be written small. Or take, it occurs to me, if I may offer another example of it, at the very beginning of the Bible you have the description of the Creation, “And the Spirit of God hovered—or floated, whatever the word is—on the face of the waters.” Now, in every Christian translation the word “spirit” would be capitalized because the assumption there is that it's a reference to the Holy Ghost.

Now, the Jews understand it, assuming that it does mean “spirit,” it means the actual presence, the essence of God and it would not be capitalized. You will find in our translation that it is with a small “s”.

Now, these physical differences sometimes manifest themselves also in differences of translation. Any number of passages in the King James version will have a superscription—better define that—in the Christian Bible especially you have the various passages, the various Psalms described, summarized by a brief statement which is not essentially in, of the Bible but is a description of the translator or the editor of what the next passage contains. Now, that we call a superscription.

Judge Biggs: In legal parlance a head note, gentlemen.

The Witness: That's new to me.

Now, that superscription very frequently will say that this refers to Jesus; it describes Jesus' life.

I could—if you will give me a moment I can give you any number of Psalms where that superscription is, definitely says that refers to Jesus.

Judge Kirkpatrick: Well, the Act doesn't require the superscription to be read in the school, does it?

Mr. Sawyer: No, sir, but we have testimony that the children in the lower grades read the Bible themselves and, therefore, they have the King James version in front of them and it is presumed they see the superscription.

Mr. Rhoads: The question is what is read and there is no evidence whatsoever at any time, by children or teachers, that superscriptions have been read.

Judge Biggs: I think that's correct. I think the answer [fol. 79] should be stricken out unless you can tie it in to some prior testimony or something which may be offered hereafter.

Mr. Sawyer: Well, I submit, Your Honor, that if you place into the hands of a child a copy of the King James version, and if all copies of the King James version have the superscriptions, that it is inevitable that the child will see and perhaps read the superscription, but at least he will read it mentally, whether he reads it out loud or not. Now, we have an instance that the children themselves read the Bible in the lower grades, although it's done over the loud-speaker system definitely.

Judge Biggs: I think in all probability I ruled in error. I think it should be admitted.

Mr. Rhoads: Will Your Honor grant me an exception so to at least register my objection.

Judge Biggs: Yes. I think in view of the explanation given by counsel it is pertinent. If we find it to be not pertinent, we will strike it out.

Mr. Rhoads: Will Your Honors hear me just a moment in order that the record may be clear as to my objection to this. There is not the slightest suggestion in this case, nor has there ever been, that any superscriptions, marginal notes, head notes, or otherwise, are being read at any time



[fol. 80] by anybody in the Abington Public School System. The issue here is whether the reading of ten verses, without comment, of the Holy Bible at devotional services, in the morning so-called, is unconstitutional.

Now, for my friend to blithely make the suggestion that because somebody may have before him, a child or otherwise, a head note, a syllabus, a marginal note, particularly when in the act of authorization of the King James version in 1604 King James himself decreed and ordained that marginal notes, as I recall it, sir, were not to be included. Now, the marginal notes are no part of the Holy Bible from the point of view of the issue that is before us here. They may be to scholars part of the Holy Bible but they are not parts of the Holy Bible that are involved in the suggested interdiction of its reading by virtue of the proceeding which is before Your Honors.

Judge Biggs: I think we grasp the point.

Mr. Rhoads: Thank you, sir. I simply wanted to make my point a little more clearer.

Mr. Sawyer: Your Honor, in view of our agreement in chambers that we wouldn't overdo the number of instances, I would like to invite the doctor's attention to one or two verses by name.

I assume that you won't consider that leading but it will [fol. 81] save time.

Mr. Rhoads: Not at all.

Judge Biggs: Very well.

Judge Kirkpatrick: Before you leave the New Testament may I ask just one more question and then I will subside.

By Judge Kirkpatrick:

Q. Does the Jewish church accept the historical fact, for example, that an individual named Jesus was actually executed by the Romans, as a historical fact, regardless of who he was or anything else?

A. That would have nothing to do with the religion.

Q. Yes, that is what I mean. As history, do they accept—

A. Historically, in history there have been some voices raised in disagreement but generally speaking the historical fact is accepted.

Judge Kirkpatrick: That is all that I wanted to know. All right.

By Mr. Sawyer:

Q. Could I invite your attention, Doctor, and ask you to comment on any differences that you find in Isaiah 7:14?

Judge Biggs: Isaiah 7:14?

Mr. Sawyer: Yes.

Judge Biggs: 7th Chapter, 14th Verse.

The Witness: Yes. The 7th Chapter of Isaiah speaks of [fol. 82] a situation in which the prophet pointed to or expressed himself, "Behold, a virgin shall conceive, and bear a son, and call his name Immanuel."

Q. Now, what version are you reading from there, sir?

A. This is the King James version.

Q. How does that language appear in the Jewish—

A. In the, in our version it reads, "Behold, the young woman shall conceive and bear a son and shall call his name Immanuel." It is "the" and "young woman."

Now, the translation "young woman" was in this instance accepted by the revised standard version. Not all Christian sects have approved, but in this instance the old Jewish translation was accepted, but they still say, "a young woman," which is admissible from the point of view of the Hebrew text. But there we come up against a distinct difference in religious faith. The Jewish attitude was that the prophet was speaking about a situation which existed right in front of him. The king had a young wife and she was pregnant and the prophet turned to the king and said, "Now, this young woman who has conceived," or if she wasn't pregnant, "will conceive and she will bear a child and his name should be," as we interpret it poetically speaking "Immanuel," which is the Hebrew for "God is with us."

[fol. 83] Now, the Christian church subsequently took this, as it did any number of other passages, as a prophecy, a prediction of things that were to happen many centuries later and took the words "young woman," which could be from the Hebrew viewpoint, could be either a married young woman or an unmarried young woman, took it to

be a virgin. And so you have here an example, one of the basic examples of deviations between the two, the differences between the two faiths.

Q. Now, Doctor, as a rabbi, could you comment on the religious aspect from the standpoint of Jewish faith of necessarily reading the Bible without comment.

A. Again, here is a difference in attitude: I don't know to what extent it is prevalent among Christians at the present time. In Judaism the Bible is not read, it is studied. There is no special virtue attached to a mere reading of the Bible; there is a great deal of virtue attached to a study of the Bible. And it, therefore, always strikes me, speaking for myself, as rather peculiar that anything such as reading the Bible should be an important matter. I can understand, and let me, to make my position clear, I want to state it quite firmly, that I think it is more important for Christian children or Christian adults to read and to study the Bible, to study it. But as soon as you begin study [fol. 84] ing the Bible in the school, of course, there you have a distinct violation of a basic principle of Americanism.

Judge Biggs: Let me ask this question—

Mr. Sawyer: I didn't mean for the doctor to go on and make that comment. I think that may be stricken. I will agree to that.

Mr. Rhoads: I would like to ask that all of the doctor's last answer to Mr. Sawyer's question be stricken because it seems to me—

Judge Biggs: I am not sure where the answer should be divided. I think it might be well that the whole answer be stricken and then you ask the question again and you may omit the characterization.

The Witness: I am awfully sorry about it.

Judge Biggs: That is quite all right, Doctor. This is a difficult subject, Doctor.

By Mr. Sawyer:

Q. Let me put my question this way: As a rabbi are you familiar with instances in which confusion has arisen

in the minds of children with whom you have come in contact as a rabbi as a result of the mere reading of the Bible without explanatory comment or interpretation by somebody authorized and qualified to do so in the Jewish faith, and if so could you give us such an example?

Mr. Rhoads: If Your Honors please, may I object to that [fol. 85] question in its present form and in substance?

Judge Biggs: We think the question is admissible. We will overrule the objection.

The Witness: If I may answer that question, I would like to cite, with all due respect to Mr. Schempp who testified just a little while ago, the statement that he made, and indicate how the Bible is misunderstood when it is taken without explanation. I mean this reference to a passage in the Bible in Leviticus, which certainly is rarely read, but if an animal is found dead, killed or died naturally, that a Jew may not eat it but a non-Jew may.

Now, if you study the passage it becomes perfectly clear that it was not an act of contempt for the non-Jew but an act of further sanctification for the Jew. He was to abide by certain rules. But since the non-Jew in those days, and presumably now, wouldn't hesitate to eat that kind of animal, you are not to deprive him of it. But as a Jew you are not supposed to eat it. Now, that does not come out from a mere reading of the Bible but it does come out from a study of the Bible, and there are any number of such instances.

Judge Kirkpatrick: You were asked about the particular [fol. 86] cases of children that you were familiar with who were confused.

The Witness: Yes. Now, there are children who have come to me, I mean Jewish children, naturally, who have come to me and on some occasions—I used to be a teacher, too. That I didn't say before—and told me that or asked for explanations of certain readings which were made to them and which led to discussions afterwards with their fellow students, much to their dismay because their answers just came out second best.

For example, such a simple story as the sale of the birth right by Esau to Jacob. Now, if you read the passage as

it is written, without paying too much attention to it, it is possible, as happened, for a child, for a non-Jewish child to come to a Jewish friend and say, "I see now your ancestor was a cheat. He took advantage of his brother who came in tired and hungry and made him give up something valuable for a mess of pottage."

But the point of the story, which I had to—I remember having to explain to the complaining child—was the last phrase in it. The point was, "Thus, Esau despised his birthright."

It wasn't the question of whether Jacob took advantage of him or not; the point of the story is that Esau had so little regard for his birthright that he was ready to sell [fol. 87] it or give it away for a petty thing.

Judge Biggs: How does that go to the issue of sacrilege or blasphemy?

The Witness: No, that's—

Mr. Sawyer: That doesn't Your Honor. That goes to a different issue, which is the possible confusion which we say is very likely, if not inevitable, when the Bible is read without comment, as under this statute it must be, and he is giving an example, and he gave another one from Mr. Schenck's own testimony; he said, now, here is Mr. Schenck who interprets this about the meat not being eaten by Jews but can be given to strangers as being a very harsh rule, and he says that if you explain that, if that comes to you in the aegis of the church, if that book were read to you under the aegis of a church or even a family, there is someone there who can explain what that means according to their likes, and without that explanation the child may get an impression—we can't say whether it is a true or false one because what is true or false is relative in this particular case now—it may get an impression contrary to what its religion believes to be true.

Judge Biggs: Well, I can see how it can have sociological significance but how does confusion have religious significance?

Mr. Sawyer: But isn't it to the interest of the church [fol. 88] and didn't we have testimony so far as to the



Jewish church that the text is important, that is if the religion believes that the particular text that they follow and the particular book that they use is indeed the work of God, either in the sense of it having been God who moved the hand of those who wrote, or at least those who wrote wrote with Divine inspiration, then to a person so religiously oriented it becomes an extremely important matter whether or not the person, the child hearing it might come away with a false impression as to what that religion says God meant by the particular passage involved.

By Mr. Sawyer:

Q. Now, to move on again, Doctor, by specifically calling your attention to a passage, would you refer in the King James version to portions of Matthew 23, which, to refresh all of our recollections, I would ask you first to read and then to comment upon from the standpoint of the Jewish faith and, secondly, from the standpoint of the reaction of a Jewish child, if it's been within your experience, to that passage.

A. Well, in Matthew 23 we have an address of Jesus about his contemporary Jews, and in several portions of that chapter he says—I am reading Verse 13 from the King James version—"But woe unto you, Scribes and Pharisees, [fol. 89] hypocrites! For ye shut up the Kingdom of Heaven against men," and so on, and then that's repeated later on on the various, where he makes various points. And it seems perfectly clear that a Jewish child subjected to this kind of reading, and finding that his, the traditional leaders of his religion are being called hypocrites by the most important personality of the religion of the other children, are not going to be very happy about it.

Q. And how about Matthew 26, sir?

A. Is it 26? No. It is—I think you refer to Chapter 27.

Q. I am sorry.

A. Which discusses—

Q. The scene of the conviction.

A. —the crucifixion and the conviction. And the scene is, if you recall, where he appears, where Pilate, Pontius Pilate comes out on the balcony of his palace and asks



the crowd down below whether they would choose that he release Jesus—may I read—which is called Christ and, or Barabbas, who was a thief. And Verse 22: "Pilate saith unto them, What shall I do then with Jesus which is called Christ? They all say unto him, Let him be crucified.

"And the governor said, Why, what evil hath he done? [fol. 90] But they cried out the more, saying, Let him be crucified."

And then when Pilate saw that he couldn't prevail, he washed his hands and said that he is clear of this sin.

"Then answered all the people, and said, His blood be on us, and on our children."

And I submit to you that this verse, this exclamation has been the cause of more anti-Jewish riots throughout the ages than anything else in history. And if you subject a Jewish child to listening to this sort of reading, which is not at all unlikely before Christmas or before Easter—rather, before Easter, I think he is being subjected to little short of torture.

Mr. Sawyer: Well, all right, if there is no objection to that I will leave it go at that.

(Counsel confer at counsel table.)

Mr. Rhoads: I assume, sir, that this type of testimony is subject to my objection; that is the reason I did not rise to object to the conclusion which our learned friend made when he said this is a little short of torture. I think [fol. 91] that that is completely beyond the scope of this trial.

Judge Biggs: I think so.

Mr. Rhoads: But I think that I can raise the question at subsequent proceedings and that it's unnecessary to do it now.

Judge Biggs: The Court so views, so understands your position.

Mr. Rhoads: Thank you, sir.

Mr. Sawyer: Cross-examine.

Judge Biggs: I think we should go on, gentlemen, until five o'clock, and I think it would be well to state at this point that we will sit starting at ten o'clock tomorrow, take a brief recess, go through Wednesday, but will have to conclude due to engagements of the judges by twelve noon on Thursday.

Mr. Sawyer: Oh, well, Your Honor, of course, I have no idea how long Mr. Rhoads' cross-examination of Dr. Grayzel will be, but for my own part, sir, I have the two younger Schempp children to put on, whose testimony will be necessarily more brief than those who preceded them, both by reason of being somewhat cumulative and because they are much younger, and that is the end of our case except for submission of some documents. And since [fol. 92] it is my understanding that Mr. Rhoads' case will be deferred—

Judge Biggs: It has been agreed to November.

Mr. Sawyer: —be deferred to some other time, I can't conceive that we will run beyond noon tomorrow, unless your cross-examination—

Judge Biggs: Better strike out the word "November." Whatever date Mr. Rhoads and—

Mr. Rhoads: Yes, and Your Honor's agree.

Judge Biggs: Yes, it will be convenient.

Mr. Rhoads: May I suggest, sir, I'm in entire accord with what Mr. Sawyer just said about the question of time.

Judge Biggs: Then you want to conclude now?

Mr. Rhoads: I would suggest it to Your Honor that it might help in the orderly development of the cross-examination of a witness of this distinction if I might have the evening to consider his testimony and either limit or in some way circumscribe the amount of my cross-examination.

By Judge Biggs: (

Q. Doctor, you live in the environs here?

A. Yes, yes.

Q. Would tomorrow morning be all right with you?

[fol. 93] A. Yes, perfectly all right.

Mr. Rhoads: If that would be convenient to the doctor—of course, I could go on now if Your Honor wishes me to do so.

Judge Biggs: No. I have only one question which I would like to clear up.

By Judge Biggs:

Q. Doctor, I have attended a number of Bar Mitzvah ceremonies of my friends who were rather of your religion. On those occasions the Torah was always read.

A. That's right.

Q. Isn't that a reading of the Five Books of Moses?

A. That's right. That is a public reading which is supposed to be preceded by a private reading. Now, they don't do it nowadays, I grant you that, but it is a public reading for religious purposes, but the actual reading of the books for the individual is supposed to have come before.

Q. Are there not comments made by the rabbis present at a Bar Mitzvah ceremony, and also by the candidate. I think it is a manhood ceremony, is it not?

A. That's right.

Q. And by his father or his uncles, or something of that sort, which really interprets the Torah?

A. It's not necessarily an interpretation. The rabbi [fol. 94] address is probably an interpretation, the others are, in modern times, more in the nature of religious exhortations which have little to do with the reading, with the text read.

Judge Biggs: Thank you, Doctor.

Mr. Rhoads: Would you have any objection, sir, if we then adjourned until tomorrow?

Judge Biggs: No. I am agreeable.

Mr. Rhoads, do you see anything in the case thus far in respect to your cross-examination, which would continue the case much beyond tomorrow noon?

Mr. Rhoads: I couldn't conceive of it, sir. Frankly, I think my cross-examination would extend not beyond a half to three-quarters of an hour, as I can see it, at the outside.

Judge Kirkpatrick: Well, that is all right then.

Mr. Rhoads: And I have, as you know, no testimony, sir, because of the understanding which you have been good enough to make with counsel.

Judge Biggs: Very well, then, I think it would be appropriate if Court adjourned this case—maybe we better say “adjourned this case,” because I believe the Court will be sitting in other matters very promptly at nine o'clock [fol. 95]—until ten o'clock tomorrow morning in this courtroom.

Mr. Rhoads: Thank you, sir.

Judge Biggs: Court will now stand adjourned.

(Adjourned at 4:25 p. m. until Wednesday, August 6, 1958, at ten a. m.)

[fol. 96]

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

**Excerpts From Transcript of Trial—August 6, 1958**

Philadelphia, Pa.

[fol. 97]

Before Hon. John Biggs, Jr., Chief Judge, Third Judicial District.

Hon. C. William Kraft, Jr., District Court Judge.

Hon. William H. Kirkpatrick, District Court Judge.

**APPEARANCES:**

Present: Henry W. Sawyer, 3rd, Esq., and Wayland H. Elsbree, Esq., for the Plaintiffs.

C. Brewster Rhoads, Esq., Percival R. Rieder, Esq., Philip H. Ward, Esq., and Sidney L. Wickenhaver, Esq., for the Defendants.

Thomas D. McBride, Esq., Attorney General of the Commonwealth of Pennsylvania, Harry J. Rubin, Esq., and Lois G. Forer, Esq., Assistant Attorneys General, for the Commonwealth of Pennsylvania.

Second Day

[fol. 98] Mr. Sawyer: Your Honor, when we reached the end of yesterday Dr. Grayzel was on the stand. He had given an answer which, if I am not mistaken, I acceded to being stricken, or at least a portion of it. I would now like to withdraw that remark on my part and attempt to ask one or two more questions of Dr. Grayzel which would, in my judgment, justify that statement remaining in the record.

The statement in question, Your Honor, was about the feeling of torture to the child.

Judge Biggs: Yes.

Mr. Sawyer: And thereupon, with leave of Court, I would like to ask Dr. Grayzel two or three more questions before I—

Judge Biggs: All right. Now, what is your motion in respect to the statement which has been made? I am not sure—

Mr. Sawyer: That my statement saying that I agreed that that latter portion of the statement might be stricken be withdrawn and I have an opportunity—

Judge Biggs: You wish to withdraw that statement that you made?

Mr. Sawyer: Yes, sir.

Judge Biggs: Any objection, Mr. Rhoads?

Mr. Rhoads: Of course I have no objection, sir.

[fol. 99] Judge Biggs: I understand your objection goes generally.

Mr. Rhoads: Oh, yes, the objection goes generally to the line of testimony, and obviously I wouldn't want to hold Mr. Sawyer to a statement made yesterday which he wishes to retract.

Judge Biggs: Very well. Then let the record show that the Court allows Mr. Sawyer to withdraw that statement. And let Dr. Grayzel testify further in respect to that.

SOLOMON GRAYZEL, resumed.

Direct examination (continued).

By Mr. Sawyer:

Q. Dr. Grayzel, have you been a teacher of Jewish children in religious subjects?

A. Yes, I was a teacher for a period of some twenty years or more.

Q. A little louder, please, sir.

A. I taught for some eighteen years right here in Philadelphia at the Gratz College. That is on Broad and York Streets. It's a college for the training of teachers in [fol. 100] Jewish religious schools. Most of the pupils in the college itself ranged from I should say fifteen to about, to over twenty.

Q. Have you ever taught—at any other time have you ever taught younger children?

A. Yes, in my student days in New York I taught children, oh, about ten to thirteen or fourteen.

Q. And either there or in Gratz College did you have an opportunity to observe the effect and the response of children to religious teaching generally?

A. Naturally, it can't be helped. After all, all these children are pupils of the public school.

Q. I hadn't—well, first of all, are you familiar with the general reaction and response to a child to religious teaching that you gave? Are you familiar with that?

A. To my own religious teaching?

Q. Yes, that's right, to your own religious teaching.

A. Yes. If I understand you correctly, all I can say is that some of them were very much interested and some were less interested.

Q. And—

Mr. Rhoads: Meaning all children.

The Witness: Yes, sir.

[fol. 101] By Mr. Sawyer:

Q. Did you also have occasion to have it come to your attention as to the effect upon these children of religious



matter having to do with the story of Christ and his crucifixion?

A. Oh, well, there is a very interesting psychological situation in the case of Jewish children. They are brought up in the midst of a Christian environment. The story of Christianity obviously plays some part in their contacts both in the outside world with their friends and certainly within the school, within the environs of the school. It is inevitable and certainly part of their education—I don't think it is possible to expect anything else—that some thing of the story of the origin of Christianity should be taught or should be discussed.

Very much depends—I am talking now from the viewpoint of the Jewish child and its attitudes and its adjustment to the outside world; its happiness, in whatever term you want to apply to it, is very important how this story is told, how it is taught, and how the child's friends react to it. Given an intelligent teacher—Jewish, Protestant, Catholic, it doesn't matter—given an intelligent teacher that story can be taught in such a way as to leave no scars on the consciousness of the child. I don't know how many [fol. 102] such teachers there are.

The story itself isn't itself to being told in such fashion as to act as a divisive force within the children's—within the society, within the social milieu of the school. And I have had any number of instances where a pupil of mine, let us say here at Gratz College, a high school pupil, would come very much disturbed at the way the story was presented to him.

I am not talking about Bible reading. I mean the way the story is presented, whether in connection with the Bible or not, I don't know. And this passage, for example, to which I referred yesterday, from Matthew 27, is one of the crucial passages.

Q. Now, Doctor, if the passage alone were read in the absence of the kind of instruction and the kind of explanation which you say is possible, what then in your experience would be the reaction of the Jewish child?

Mr. Rhoads: If Your Honor pleases, may my objection go to all of this testimony.

Judge Kirkpatrick: It is a matter of pure argument anyhow.

Mr. Rhoads: Exactly, sir. I didn't want to interrupt the doctor in his—

Judge Biggs: It is obviously a matter of argument, but, [fol. 103] on the other hand, this is a rather shall I say a subject in which the presiding Judge is not particularly skilled. I would like to hear this for the time being anyway.

Let's not pursue this too far along the line embarked.

Mr. Sawyer: This is my last question.

The Witness: I beg your pardon, I have forgotten the question.

Mr. Sawyer: Will the stenographer read that question, please.

{The last question was repeated by the reporter, as follows:

"Q. Now, Doctor, if the passage alone were read in the absence of the kind of instruction and the kind of explanation which you say is possible, what then in your experience would be the reaction of the Jewish child?"

A. I think that without explanation this is a very, very serious matter. I think it can be explained. I think it should be explained. If a teacher reads it in class or wants to tell the story with this passage as part of it, you cannot, I mean, erase it from the Bible, from the New Testament. But given an explanation it can be put in its place and can [fol. 104] leave less harmful effect. But without explanation I think it is a direct accusation and a threat which is very disturbing.

Mr. Sawyer: Thank you, sir.

Cross-examine.

Cross examination.

By Mr. Rhoads:

Q. Doctor, do I understand that the substance of your last questions, the answers to which you have just given, is based upon other than Bible reading without comment in the public schools?

A. Well, I cannot connect it with Bible reading. In my memory I don't recall that any discussion took place. It may have but I don't recall it. Don't forget I taught for some twenty years. But I cannot recall that it was directly connected with Bible reading.

Q. So the—

Judge Kirkpatrick: May I ask just one question, please?

Mr. Rhoads: I beg your pardon.

Judge Kirkpatrick: May I ask just one question?

The Witness: Yes.

Judge Kirkpatrick: It is in line with what you asked.  
[fol. 105] Mr. Rhoads: Pardon me, sir.

By Judge Kirkpatrick:

Q. Bible reading is one thing, the Lord's Prayer is another thing. Now, does the Lord's Prayer contain anything which the Jew would find objectionable or offensive from his religious standpoint, the Lord's Prayer itself?

A. The wording of the Lord's Prayer is so completely derived from Jewish sources, from Jewish literary source material, sentence for sentence, almost phrase for phrase, it goes back to rabbinic material or to Biblical material, that to the contents of the prayer there can be no objection. The only objection is to the name, strangely enough. When a Christian calls that the Lord's Prayer he means Jesus. If they would say God's Prayer, I—we say those phrases constantly in the Jewish service.

Q. That explains what I wanted.

A. It is the title of it.

Judge Kirkpatrick: Go ahead, sir.

By Mr. Rhoads:

Q. Now, Doctor, in all, therefore, of your teaching experience you can cite no instance, I understand, in which a Jewish child came to you and complained to you about the reading without comment of ten verses from the Holy Bible in the public schools, is that right?

[fol. 106] A. If you recall, sir, yesterday I pointed out that there was this one instance, the only one that for the

moment I can recall, of the story of Jacob and Esau and the sale of the birthright.

Q. But except for that—

A. Except for that, at the moment I cannot recall anything else.

Q. And you have known, of course, Doctor, that you were going to testify in this case, I suppose, for some time?

A. Some weeks, yes.

Q. Now, Doctor, I understand from your testimony that your criticism about the reading of the Bible is the fact that it is being read and not explained. Is that the layman's judgment of what you said?

A. I think that is correct.

Q. Now, if while the Bible was being read the person who read the Bible gave his or her own version of what was then being read, that would be interpretive reading of the Bible, is that correct?

A. That's right; that's right.

Q. And to the—withdraw that.

Now, Doctor, you have mentioned the fact that you, in so far as you can speak for the Jewish faith or for yourself as representing the Jewish faith, you answered Judge [fol. 107] Kirkpatrick by indicating that you had no objection generally to the Lord's Prayer except for the use of the word "Lord." And you gave the reasons for it.

A. That's right.

Q. Now, that, the Lord's Prayer, stems from an historic fact, does it not, sir?

A. As the New Testament tells it, yes.

Q. Yes. And the Jews as a faith recognize the historic fact that Jesus the man said what is said in the Lord's Prayer at a given moment in his ministry life, is that correct?

A. Now, Mr. Rhoads, you are—if I answer your question very simply you are going to hurt my scientific conscience.

Q. Well, now, Doctor, I am sure that your scientific conscience is so far greater than mine that I wouldn't want to hurt it, and you answer it in your own way, sir, and forgive my bungling approach to the question, if you will.

A. Well, you see, historically, from the point of view

of historical research, it is not at all certain that all the words attributed to Jesus were actually uttered by him. The only thing that I feel is absolutely certain is that such a personality existed, that he had followers, that he made certain claims, the nature of which is also in doubt, and that eventually the Romans executed him. All the rest, the [fol. 108] various speeches, teachings and what not, are open to doubt as to whether he said them at all, and certainly as to whether he said them in just these words. There were no stenographers in those days. Consequently, when you ask me whether I will admit that he said these words, I cannot in good conscience admit it.

Q. I understand, Doctor, and I understand the scientific basis of your answer. That brings me to the next question. You have had broad experience in translation, have you not, of the Bible?

A. Yes.

Q. Doctor, long before the King James version there was a version of the Bible translated into Latin, was there not?

A. That's right, the Vulgate.

Q. The Vulgate edition. And about when was that translated?

A. Oh, this was very early.

Q. Very early?

A. This was the third century, the fourth century.

Q. And that was translated into the Latin because chiefly the language of religion in those days was the Latin tongue, is that correct?

A. That's right.

Q. Now, there came a time in the history of men when it [fol. 109] seemed rational to translate the Bible into something other than the language of religion, namely, the Latin language, is that right?

A. That's right.

Q. And that is what led to the English translations of the Bible stemming with the final translation of the King James version, is that correct?

A. That's right.

Q. Now, Doctor, whether Jesus said certain things or whether certain acts took place in ancient days, the trans-



lations which were made into English were made, were they not, from precisely the same source materials in the Greek and Hebrew as were the translations into the Vulgate and Latin?

A. So far I go along with you.

Q. Well, is the answer "yes"?

A. If you will let me make certain reservations I will say yes.

Q. Doctor, we are here to have whatever statement you wish to make, sir, because we value your opinion on this.

A. You see, the reservation I want to make is that no translation of anything can be separated from the person who does the translating.

—Q. I understand.

A. If you and I were to translate the same sentence from [fol. 110] any language into English we would—our translations would differ and sometimes would differ as to—because of the differences of our personalities.

Now, you take the translators into the Latin or into the English or into any language. Naturally their translations will differ in line with the differences in their viewpoints. Otherwise you wouldn't have a Catholic translation and a Protestant translation. The Catholics will not think of using the King James version. Their translation, the Douay translation, is completely—not completely different, naturally, but it differs to the extent to which they differ in viewpoint.

Q. Well, now, Doctor, the Douay version of the Bible is a translation which is substantively similar to the King James translation in those areas in which the Catholic faith includes the Books of the Bible; that's correct?

A. No, in which the Catholic faith finds—finds—

Judge Biggs: What was your first word that you said, Doctor?

Judge Kraft: "No."

Judge Biggs: "No"?

The Witness: "Yes."

Judge Biggs: "No."

A. (Continuing) In large portions where there is no doctrinal difference they will be the same, but in



other portions where there is a doctrinal difference they will not be the same. Certainly that is true of the Jewish translation into English and the—and any translation of the Christian. As I pointed out yesterday, I can give you any number of other instances. The words are the—the Hebrew words are the same but the translation differs in accordance with the personality.

By Mr. Rhoads:

Q. And in accordance with the scholarship that is back of the personality?

A. Some times it is a matter of scholarship.

Q. Now, Doctor, will you agree that when the King James version was ordained to be translated in 1604 an attempt was made within the orbit of the then existing scholarship to make an accurate translation into the English tongue?

A. That's right. As they saw it; as they interpreted accuracy.

Q. As they interpreted the original Hebrew and Greek, is that correct?

A. That's right.

Q. Now, there were, therefore, original documents in Hebrew and Greek from which, whatever the translation be, the translation was actually made, isn't that correct, Doctor?

A. That's right, yes.

[fol. 112] Q. And those documents, if you will, historically are the backbone of the substance of the Bible as translated today, whether Jewish, Catholic or Protestant, is that correct?

A. That's right.

Q. Now, Doctor, will you agree with me—I think you used the expression "literary merit"—excuse me, "source."

A. Yes.

Q. Will you agree that in the King James version, as we know the King James version today, Old and New Testament, there are passages of great literary merit?

A. Absolutely.

Q. Will you admit that there are passages of great moral virtue and merit in both the New and the Old Testament?

A. Yes.

Q. Will you agree, Doctor, that the substance of those moral and literary values, or substances which appear in the King James version, actually appeared in the Greek and Hebrew manuscripts from which the translation was made?

A. Yes, of course, but there is always a "but" involved.

Q. Well, excuse me, Doctor. I think you can answer that question yes or no, can't you?

A. Yes.

Q. And the answer is—

A. The answer is "yes."

[fol. 113] Q. —in agreement with me. Thank you.

Now, Doctor, you spoke earlier in your testimony of the Sacred Books in connection with the Jewish faith and that they were divided into three categories, I believe.

A. That's right.

Q. Did I interpret your testimony correctly?

A. Yes, I think so.

Q. Now, who in the Jewish hierarchy determines what shall be the Sacred Books so set apart into these different categories?

A. Oh, my, that is a matter of very long standing. The Jewish canon, if I may use a technical term,—

Q. Yes.

A. —which I think we all understand, was set around the first or second century of the Christian era, and even then it was already a tradition of centuries, a tradition centuries old, that the five Books of Moses were to be given greater, higher status than the Prophetic Books, and that the other writings were of even less standing. So what happened in the second century was simply a ratification of what was already then an old tradition.

Q. So that that Jewish tradition has carried through to the present day, has it not, Doctor?

A. That's right.

Q. And the question of what books shall be placed in a  
[fol. 114] higher order than other books is a matter deter-

mined by the hierarchy of the Jewish faith in accordance with this Jewish tradition?

A. Again, if I may correct your statement and then I will answer "yes." I will just correct your statement.

There is no such thing as a Jewish hierarchy, you understand, now, nor was there for a long time, or if ever. This is a matter of history of tradition. It was determined for us two thousand years ago or more and we don't make any changes in that situation. All I can say yes to, therefore, is the fact that there are these three categories of books.

Q. Now, Doctor, coming back to the question of literary and moral values, would you say that there is substantial moral value in the story of the Good Samaritan?

A. It is a good story.

Q. Luke 10:30.

A. Yes. It is a good story.

Q. Well, will you say—

A. It has—now, let me—

Q. I beg your pardon, sir.

A. If you will permit me to go into some elaboration of this. It's a good story and it does have moral value. Yet it is the sort of story which, one, can be read and [fol. 115] leave a very harmful effect, destroying, at least for the Jewish child, all the good that the moral element can offer. Two, it is a story which on the face of it, on the face of it could not have—was modified, did not happen originally or was not told originally as it is now told in the New Testament.

Now, let me start with the second one first. You have the story—I think we are all familiar with it—of this very sick, dead—a dead person or a sick person lying on the road. There are three people who pass by, a priest, a Levite and a Samaritan. Now, notice the Jewish—the Jews, and especially in those days—the divisions still continue to this day, but they were much more strongly asserted in those days—the three divisions were priests, descendants of Aaron who were priests officiating in the temple who had to be pure in order to enter the temple—"pure," I mean ritually pure—the Levites, whose purity was not expected to be so great but they were also descen-

dants of Aaron, and Israelites, ordinary Israelites, who were not subject to the laws of purity quite as much.

Now, think of the story as it must have been told in those days. A priest passes by. He sees what he thinks is a dead body. The laws of purity apply to him. He wouldn't touch it because he would make himself impure and couldn't officiate in the temple. He passes it by. It is [fol. 116] a cruel act. He should have let, forgotten the laws of impurity and should have attended to the burial of the person, but he preferred—being a stickler for the law he preferred to take care of his purity.

Then comes the Levite; the same thing.

Then, along comes an Israelite to whom the laws of impurity do not apply in the same thing and he attends to the person who is lying on the ground.

That story told in this way, as it must have been, has a moral effect and a good story. It is a good story. What happened? In the story as it came to be told the Israelite was obviously removed and the Samaritan put in. Why a Samaritan? Well, the Samaritans and the Israelites in those days, the Samaritans and the Jews were not on good terms. Very likely the Samaritan was deliberately put in as a slap at the Jews of that day who refused to join the Christian Church, because the story on the face of it must have been, must have included priest, Levite, Israelite. That was the division. There was no such division as priest, Levite, Samaritan.

Now, you tell this story in a school to a Jewish child or in the presence of a Jewish child and a Christian child and the Christian child has every right to say, "See, you come of a people that is cruel, that doesn't understand the [fol. 117] decencies of life." And even if the Jewish child is not told that, it is made to feel that, and I submit to you, sir, that that destroys all the moral value of the story. And I don't think that that kind of story ought to be read in a public school where there are—in any public school—because it makes for division rather than for union.

By Judge Biggs:

Q. Who were the Samaritans, Doctor?

A. The Samaritans were a group of inhabitants of Palestine. Their center was around Samaria, which is a city in Palestine, and they followed certain Jewish practices, and then not quite in line with the practices which the official Jewish religion of that day demanded.

Q. Could they be described as unorthodox Jews?

A. Hardly. The Jews looked upon them as pagans.

Judge Biggs: Thank you.

By Mr. Rhoads:

Q. Doctor, in all of your experience you have never had a Jewish child who has come from the public schools and complained to you that the story of the Good Samaritan was unmoral because of the reasons which you have just indicated in your lengthy answer?

Mr. Sawyer: Your Honor, he has answered that question when he said he never had specific—

[fol. 118] Judge Biggs: Well, this is cross-examination.

A. I cannot honestly say that I have had any such instance.

By Mr. Rhoads:

Q. Thank you, Doctor.

Now, coming again to literary values, will you agree that there is great and substantial literary value in the words of the Sermon on the Mount?

A. Yes.

Q. Is there any fundamentally improper fact in your mind that comes from the reading without comment of the statement:

"Blessed are the pure in heart: For they shall be called the Children of God."

A. No, I have no objection to anything in the Sermon on the Mount, were it passage for passage. I can cite you parallels in Jewish literature.

Q. Certainly.

May I go on, Doctor?

A. Yes, please.

Q. From the point of view of literary values is there any offense to you or to a Jewish person in the public schools from Matthew 7:

"Judge not, that ye be not judged."

A. I don't recall what else there is in that context.

Q. Well, assuming that my statement is correct.

[fol. 119] A. Well, assuming that it is just that thing, it is perfectly all right.

Q. Right.

Is there anything other—withdraw that.

Will you agree that in First Corinthians 13 of Paul, which has to do with faith, hope and charity there is anything except fine literary value in that particular passage? I am speaking of—

A. No, without recalling all that goes before it or after it, that part of it is perfectly all right, surely.

Mr. Sawyer: Would you read that passage, Mr. Rhoads?

Mr. Rhoads: While I am getting it, now, if Your Honors please, I will not emphasize on the basis of our discussion yesterday further illustrations. I simply wanted to get illustratively the record in line with our thinking of yesterday.

By Mr. Rhoads:

Q. It is the passage, Doctor, which is Corinthians 1:13—

A. 1:13.

Q. —which commences—and I am not going to read the whole thirteen verses—

A. Yes.

Q. —unless you wish me to do so—which commences:

[fol. 120] "Though I speak with the tongues of men and of angels, and have not charity, I am become as sounding brass, or a tinkling cymbal."

I am sure—

A. Yes.

Q. —that you recall that passage without my reading all of it.



A. Yes, yes, yes. That's right, yes.

Corinthians 1; it is 1 Corinthians—

Q. It is 1 Corinthians, Chapter 13, and the second verse you remember it says:

"And though I have the gift of prophecy, and understand all mysteries, and all knowledge; and though I have all faith, so that I could remove mountains; and have not charity, I am nothing."

A. That's right.

Q. And then it goes on for eleven more verses.

A. Yes.

Mr. Sawyer: The thirteenth verse, I don't know what the doctor's comment would be. I would like to ask him his comment on the thirteenth verse.

Judge Biggs: Has Mr. Rhoads concluded on this issue?

Mr. Rhoads: Yes—no, not on this particular—

[fol. 121] Mr. Sawyer: I didn't mean to interrupt.

Judge Biggs: That is all right.

Mr. Sawyer: I just suggested that before the doctor commented on the implications that this particular verse might be offensive.

The Court: All right.

By Mr. Rhoads:

Q. Now, the thirteenth is:

"And now abideth faith, hope, charity, these three; but the greatest of these is charity."

A: It is perfectly all right. I think it is beautiful.

Q. Thank you.

Now, Doctor, you spoke at considerable length yesterday about the passages of Matthew 23:13 which had to do with Pilate on the balcony and Barabbas, and you remember the testimony you gave yesterday.

A. Matthew—I think you have the citation wrong. It is Matthew 27, if I am not mistaken.

Q. Was it? I beg your pardon, 27. Well, whichever it was, Doctor.

Now, as a matter of historic fact, Doctor, was that a story of Pilate and what he did and said on the balcony?

A. No, sir, I cannot accept that as history.

[fol. 122] Q. You cannot accept that as history?

A. No, sir.

Q. All right.

Now, may I ask you, then, Doctor, whether you can agree with me that whether you accept it as history, what is there said in—what is it, 27?

A. Yes.

Mr. Rieder: Matthew 27:25.

By Mr. Rhoads:

Q. Matthew 27:25 is in fact a translation from original documents in Greek and Hebrew, whether you agree with the historic fact or not.

A. If you agree to withdraw the "Hebrew," because it is not at all certain what language, what the original language of this book was.

Q. Thank you. Well, then—

A. But there was a Greek original.

Q. May we say either Greek or Hebrew.

A. Well, Greek. Let's leave it at Greek.

Q. All right, Doctor, thank you.

Now, Doctor, if assuming that the passage from Matthew that we have spoken of did appear as you have indicated in the original Greek and we had before us the document itself and we had a class in public schools which understood [fol. 123] Greek and the story read from the original Greek in the public schools to the children concerning what was said in Matthew 27 which was just quoted from, would that be objectionable to you?

A. Certainly.

Q. Thank you.

Doctor, I have just a technical question that I would like to ask you, sir, that I don't believe was covered yesterday.

May I inquire where your residence is? I don't think we got that.

A. I reside at the Garden Court Apartments, 47th and Pine Streets.

Q. And you referred to the publication of certain writings, one of them "The Church and Jews in the Thirteenth Century," I believe.

A. That's right.

Q. Could you tell us the publisher of that book?

A. That is officially published by the Dropsie College.

Q. Dropsie College. And when, sir?

A. In 1932—'33, if I am not—I think it was 1933.

Q. Thank you.

And then your other book, Doctor, was "The History of the Jews"?

[fol. 124] A. "A History of the Jews."

Q. "A History of the Jews." Published by whom, sir?

A. Published by the Jewish Publications Society.

Q. May I ask when?

A. In 1947.

Q. Now, one other question which Mr. Sawyer didn't cover. You are with the Jewish Publications Society, editor-in-chief, sir?

A. Well, there is unfortunately no associate editor so I am just the editor.

Q. And how long have you been in that capacity?

A. This is my twentieth year with them.

Q. And—

A. So I came—

Q. During those twenty years you have been doing translation, translating work that you spoke of in your direct examination?

A. Well, no, no, the translation comes into the—it is part of the job, but if you are referring to translation of the Bible from—

Q. I am, yes, sir.

A. Well, that is something that we have undertaken only in the course of the past four or five years. I mean, that's—

Q. And are you aware of the translation which has been [fol. 125] undertaken of the Revised Standard St. James Version?

A. Oh, yes, that's right. One of our—if I may add, the Chairman of our Translators Committee was a member

of that, was the one Jewish member of the Committee of Translators for the Revised Standard Version.

Q. And that was Dr. Orlinsky?

A. That's right.

Q. And was Dr. Finkelstein associated with that group?

A. With the Revised Standard Version?

Q. Yes.

A. No.

Q. Dr. Orlinsky, however, was representing the Jewish faith, one of the—

A. Not the Jewish faith. He was representing Jewish scholarship.

Q. Thank you, sir. Representing Jewish scholarship, is that correct?

A. That's right.

Q. And that group of—how many men undertook that?

A. Oh, there must have been thirty or forty of them.

Q. Thirty or forty. That was a very gigantic undertaking of modern translation, was it not?

A. That's right, that's right.

Q. And the attempt by those translators, including Dr. [fol. 126] Orlinsky, has been to bring to the world the best and newest scholarship that could be applied to the Bible, is that correct?

A. That's right.

Q. And—

A. May I modify that "yes" by adding this:—

Q. Certainly.

A. —The best scholarship, the best Christian scholarship. Dr. Orlinsky was there as an official—as a regular member but he was there more or less by courtesy. He was there to help with the understanding as in line with the Jewish scholarly tradition, Jewish commentators and what not, but when it came to a question of translating for purposes of religious worship, or for purposes of religious study, he didn't have a say and didn't want to have a say.

He told me, for example, of any number of—

Q. You needn't tell us this, Doctor.

A. I beg your pardon.

Q. Thank you just the same.

I have no further questions, Doctor. Thank you very much for your assistance.

Mr. Sawyer: Thank you.

Judge Biggs: There is nothing on re-examination, is there? Do you have any questions, gentlemen?

[fol. 127] (No response.)

Judge Biggs: Thank you, Doctor.

Mr. Sawyer: Roger Schempp.

ROGER WADE SCHEMP, having been duly sworn, was examined and testified as follows:

Judge Biggs: Suppose you move that microphone a little bit further in front of you, Roger. Yes; that's right. Now, take your time and speak up. We will give you all the time you want.

Direct examination.

By Mr. Sawyer:

Q. Roger, where do you go to school?

A. At Huntington Junior High School.

Q. And are you the son of Mr. Edward Schempp, who testified yesterday?

A. Yes, I am.

Q. And is Ellory Schempp your brother?

A. Yes.

Judge Biggs: Will you speak just a little bit more loudly. It would be of some assistance.

By Mr. Sawyer:

Q. How old are you, Roger?

[fol. 128] A. I am fifteen.

Q. And what grade are you in? What grade were you in last year at Huntington School?

A. Eighth grade.

Q. In the eighth grade.

Now, do they read the Bible—did they read the Bible last year in the eighth grade at the Huntington School?

A. Yes, they did.

Q. And who read the Bible? How did they read it at the beginning of the year?

A. At the beginning of the year the kids did read the Bible for a while.

Q. And who selected what they read?

A. The kids themselves.

Q. Who selected which one of the children was going to read it?

A. It was in a system of going around the room. They started from one side of the room and rotated.

Q. When did that take place, Roger? I mean, what time of the day?

A. That was right in the early morning.

Q. And after the Bible was read what happened then, if anything?

[Vol. 129] A. Then we had the Lord's Prayer and the flag salute.

Q. And did you sit or stand for the Lord's Prayer?

A. We stood for the Lord's Prayer.

Q. What did the children do? Did they take any particular posture when they said the Lord's Prayer?

A. Some of them bowed their heads and some of them didn't.

Q. Was there a name for this exercise?

A. Yes, it is called Morning Exercises.

Q. Was there a change in that way of doing it during the course of the year?

A. About the middle of the year—I am not sure about when—but—

Mr. Rhoads: Excuse me, Roger. What year are we talking about?

The Witness: This is—

Mr. Rhoads: This current year?

Mr. Sawyer: The year that has just been over.

The Witness: This is—

Mr. Rhoads: 1957-'8 year?



The Witness: Yes.

Mr. Rhoads: Thank you. Excuse me.

A. (Continuing) I am not sure about the time, but during the year, the course of the year, the Bible reading was taken up by the teachers and the kids did not read it after that.

[fol. 130] By Mr. Sawyer:

Q. And have you ever talked about this Bible reading and saying the Lord's Prayer with your family?

A. I did.

Q. Did you agree with the attitude that your older brother Ellory and your father have about it?

A. I do.

Q. Does your mother agree with that, too?

A. Yes.

Q. Do you go to church of Sunday school, Ellery—I mean Roger?

A. Yes.

Q. Where do you go?

A. To the Unitarian Church of Germantown. I attend Sunday school and church both.

Q. You mean sometimes you go to Sunday school and sometimes you go with the family to the church itself?

A. Yes.

By Judge Biggs:

Q. Or sometimes you do both?

A. Yes.

Q. You go to both church and Sunday school. Thank you.

—[fol. 131] By Mr. Sawyer:

Q. Do you believe, Ellory, in what we call the Divinity of Christ?

A. No.

Q. What do you believe about Christ?

Mr. Rhoads: If Your Honor pleases, I suppose that if Mr. Sawyer wants to pursue this Your Honor—

Judge Biggs: I think he is entitled to.

By Mr. Sawyer:

Q. What do you believe about Christ, Ellory—I mean Roger. Excuse me.

A. I believe he was a great man but I do not think he was some of the other things they claim he has done and is supposed to have happened.

Q. When you say “they claim” you mean that is claimed in the Bible?

A. Yes.

Q. And you have never protested to your teachers or anybody about this practice, have you?

A. No.

Mr. Sawyer: Cross-examine.

Cross examination.

By Mr. Rhoads:

Q. Roger, do you remember when you first spoke to your [fol. 132] mother or father about this Bible reading and why you objected to it?

A. I do not recall.

Q. Was it sometime last year?

A. It was near the time my brother—

Q. What?

A. It was around the time—I would have been thinking of it, too, around the time my brother mentioned it to my father and mother.

Q. About the time—I couldn't quite hear you, Roger.

A. I would have been thinking about it, too, about at the time my brother was talking to my—had mentioned it to my father and mother about the Bible reading case, the Bible reading in the school.

Q. Well, now, do you remember when that was that you decided that you felt strongly about this?

A. It was about the same time Ellory—when he brought it up, I thoroughly agreed with him on the Bible reading; when my brother talked about it with my parents.

Q. Did that have anything to do with about the time that you realized that Ellory would be graduated before you had a chance to tell the Court about this?

A. I had realized that, yes.

Q. It was about that time?

[fol. 133] A. Yes, it was about that time.

Mr. Rhoads: That is all.

Mr. Sawyer: Thank you very much, Roger.

Judge Biggs: Thank you, Roger.

Mr. Sawyer: Donna Schempp.

DONNA KAY SCHEMPPE, having been duly sworn, was examined and testified as follows:

Judge Biggs: Donna, you will keep your voice up as well as you can, please.

Direct examination.

By Mr. Sawyer:

Q. Where do you go to school, Donna?

A. Huntington Junior High School.

Q. And how old are you?

A. I am twelve.

Q. What grade were you in last year?

A. Seventh.

Q. Did they read the Bible in the seventh grade at the Huntington Junior High School?

A. Yes, they did.

Q. When did they read it and how did they read it?

A. They read it in the morning the first thing and it was [fol. 134] read in the beginning of the year by the students.

Q. How did the students—how did they pick what student was going to read it on any given morning?

A. Whoever volunteered.

Q. Whoever volunteered.

And who picked the passage that was to be read?

A. The student.

Judge Biggs: Donna, were you in a different home room than your brother?

The Witness: Yes, I was.

Judge Biggs: Thank you.

Mr. Sawyer: Your Honor, she was one grade below, you see.

Judge Biggs: Yes, of course.

By Mr. Sawyer:

Q. Now, did that—well, after the Bible was read then what happened?

A. Then we would rise for the Lord's Prayer.

Q. And would somebody tell you to rise?

A. Well, it was just done as a matter of habit.

Q. And would the Lord's Prayer then be said—who said it then, everybody or what?

A. The whole class.

Q. And what was this occasion called in the morning? [fol. 135] What did the kids call it?

A. Morning Devotions.

Q. Did the teachers refer to it also as Morning Devotions?

A. The teachers didn't really refer to it.

Q. And did you ever—did you notice at any time that there was a change in this way of doing it, and, if so, what was it?

A. About late November or early December the teacher suddenly decided that she was going to be the one to read it.

Q. And did she then—was she then the one to read it?

A. Yes.

Q. Well, before that what had the teacher done when it was being read?

A. She paid—she would make sure everybody was listening and then she herself would pay attention.

Q. And did you observe any difference in the deportment and attention that was required of the students during the Bible reading than would be during ordinary teaching?

Mr. Rhoads: Objected to.

Mr. Sawyer: It is a matter of her observation, Your Honor.

Judge Biggs: We will take it.

A. Well, during the Bible reading everybody was supposed to make sure they were doing nothing else and that

they were—their eyes were facing the person that was reading it.

[fol. 136] By Mr. Sawyer:

Q. And was that always required when someone or the teacher was reading some other work?

A. Not necessarily.

Q. Now, do you go to a Sunday school?

A. Yes, I do.

Q. Where do you go?

A. The Unitarian Church of Germantown.

Q. Did you ever have anything that was read to you in the Bible which was different from what they taught you in Sunday school?

A. I have.

Q. Could you tell us of any of those that you can remember?

A. Well, I can think of a few. In Sunday school we have been taught that in the Bible that where it says that the devil came down to Jesus and tempted Him, we have been taught that that was just a dream. And it is as a matter of fact in the Bible.

Q. And is there anything else you have heard read to you in the schoolroom that you don't believe in—I mean read to you from the Bible?

A. Well, we have been—well, in the Ten Commandments, where it says, "I am a jealous God," I have come to believe that if a God was ever jealous I don't see how He could be. [fol. 137] good. If that is the type of world that everybody believes in it's pretty horrible.

And also I don't think any man would have the powers to do the miracles that the Bible says He does.

Q. When you say "man," do I take it that you don't believe that Jesus Christ was actually the son of God?

A. I do not believe that.

Q. And did you ever recall any instance where any of your school friends had any particular reaction to Bible reading? Could you tell us about that?

Mr. Rhoads: That is objected to, sir.

Judge Biggs: This would be of your own observation, Donna?

The Witness: Yes.

Judge Biggs: We think we should receive it.

A. Well, I do know a Jewish friend who was listening to a part of the Bible where I think it was when Jesus washed the feet of a man and something happened—I don't exactly recall—and she got almost so fed up with it because she didn't believe in it that she was going to walk out of the room.

Mr. Rhoads: I ask that that be stricken out, stricken from the record, sir, for other than the reasons that I first objected to, for reasons—

[fol. 138] Judge Biggs: Would you state your reasons.

Mr. Rhoads: Yes. It seems to me, sir, that she is now attempting by that testimony to interpret the mind of the—

Judge Biggs: Let it be stricken out.

Mr. Sawyer: It is only being stricken on the ground that the witness hasn't stated her observation but has stated a conclusion of what she assumed the person felt?

Judge Biggs: In my view the witness stated a subjective interpretation of another person's mind as to what was inside the other person's mind. It may be accurate but it is not within the rules of evidence.

Mr. Sawyer: Yes, sir.

By Mr. Sawyer:

Q. Donna, did this friend of yours actually say anything to you about this?

A. Yes, she did.

Q. Will you just tell us as well as you can remember what she said.

Mr. Rhoads: There again, sir, I object.

Judge Biggs: Isn't this hearsay at this point?

Mr. Sawyer: No, sir, it is not hearsay. We are not interested in the truth of the statement but the fact that it was said.

[fol. 139] Judge Biggs: That is right. We will hear you on it.



Mr. Rhoads: Well, if Your Honor pleases, I think it is the barest kind of hearsay. The witness is testifying to what some other child said to her. There is no evidence that the other child isn't perfectly available to testify, and it seems to me that we are opening the doors.

Judge Biggs: The majority of the Court think that this is admissible.

Mr. Rhoads: May I have an exception, sir.

Judge Biggs: We will note an exception.

Mr. Rhoads: I assume I have such an exception without each time requesting it.

By Mr. Sawyer:

Q. What did your friend say, Donna?

A. She said that she was just plain fed up.

Q. Thank you very much.

Have you ever protested to your teachers about this?

A. No, I haven't.

Q. Oh, at any time when you have been in school in Abington—well, first let me ask you—strike that.

How long have you gone to Huntington Junior High School?

[fol. 140] A. One year.

Q. And where did you go before that?

A. Roslyn Elementary School.

Q. And is that in Abington Township?

A. Yes, it is.

Q. Was there ever any hymn singing in that school?

A. There was.

Q. And what hymns did you—can you remember any of the hymns that were sung?

Judge Biggs: We are going back to where, now?

Mr. Sawyer: Roslyn Elementary School, which she attended the year before last, sir.

Judge Biggs: How is that relevant?

Mr. Sawyer: On this basis, Your Honor, that one of the five points that I mentioned in my opening was this contention that one of the evils to be apprehended by such a statute is that by sanctioning under the aegis of the Legislature a sectarian religious observance in the school

that it will be inevitable that on the volunteered motion of the school authorities other religious observances will come in; that this opening of the door and opening of the wall invites and tends to encourage other religious observances. The Lord's Prayer which is in this case I think is of such a character, and if it is true that there is hymn singing it [fol. 141] would tend to sustain that contention of mine.

Judge Biggs: Well, this is in another school at a prior date.

Judge Kraft: Is this in the complaint?

Mr. Sawyer: It is not in the complaint.

Mr. Rhoads: It is not in the complaint, sir; not a word of this is in the complaint.

Judge Biggs: I really have very grave, very great difficulty in perceiving any substantial probative value.

Mr. Sawyer: All right, I will drop it, then, Your Honor. I don't think it is vital.

Judge Kirkpatrick: It doesn't affect your argument one way or the other. You can make exactly the same argument whether this testimony is in or not.

Mr. Sawyer: That is quite so, Your Honor. It goes to the evidentiary argument as to the encroachment.

Judge Kirkpatrick: It may be a valid argument but it doesn't need an actual instance to support it.

Mr. Sawyer: Cross-examine.

By Judge Biggs:

Q. One question before you commence the cross-examination.

Donna, I am not quite clear as to how this public-address system works. Did the Lord's Prayer come to you originally [fol. 142] over the loudspeaker system in the school?

A. They don't have that in our school.

Q. They don't have it in your school?

A. They only have it in the senior high school.

Judge Biggs: Thank you.

Cross examination.

By Mr. Rhoads:

Q. Donna, did you ever ask your mother to complain to the school authorities about the reading of the Bible?

A. I did not.

Q. Did you ever ask your father to complain?

A. I did not.

Q. Now, the practice of reading the Bible was, as you said, a voluntary practice in your room, is that correct?

A. Yes.

Q. And did you ever volunteer to read the Bible?

A. I did.

Q. And on how many occasions did you volunteer to read it?

A. I don't recall.

Q. More than once, though, wasn't it, my dear?

A. I think so.

Q. Now, how many verses from the Bible were read in the morning?

A. Ten.

[fol. 143] Q. Ten.

And after the verses were read the Bible was shut and nothing further was said, is that correct?

A. About the Bible?

Q. Yes.

A. Yes.

Q. And when the Bible was being read did you stand or were you seated at that time?

A. We were seated.

Q. You were seated.

And then at the time of the Lord's Prayer you arose, is that right?

A. Yes.

Q. And your teacher asked you to pay attention, is that correct?

A. Yes.

Mr. Rhoads: I think that is all, sir.

The Court: Anything more, Mr. Sawyer?

Mr. Sawyer: No, thank you.

Judge Biggs: Thank you, Donna, very much, indeed.

Mr. Sawyer: Thank you.

[fol. 160]

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

[fol. 161]

DEPOSITION OF CHARLES H. BOEHM—November 26, 1958

Deposition of Charles H. Boehm, taken on behalf of the defendants, pursuant to stipulation of counsel and instructions of the Court, at the office of Montgomery, McCracken, Walker & Rhoads, 15th Floor, Morris Building, Philadelphia, Pa., on Wednesday, November 26, 1958, commencing at 10 o'clock A. M.

Present: Henry W. Sawyer, 3rd, Esq., and Wayland H. Elsbree, Esq., for the plaintiffs.

C. Brewster Rhoads, Esq., Percival R. Rieder, Esq., Philip H. Ward, Esq., and Sidney L. Wickenhaver, Esq., for the defendants.

Russell T. Harris, Jr., Notary Public.

[fol. 162] CHARLES H. BOEHM, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Rhoads:

Q. Dr. Boehm, what is your full name?

A. Charles Harold Boehm.

Q. Where do you live?

A. I live at 1201 Yardley Road, Morrisville, Pennsylvania.

Q. How old are you?

A. I am 55.

Q. Now, Dr. Boehm, where were you born?

A. I was born at Kintnersville, Pennsylvania.

Q. So that you have been a native of Pennsylvania all your life?

A. Yes, I have.

Q. What is your present occupation or profession?

A. I am a school superintendent.

Q. By that do you mean Superintendent of Public Instruction?

A. I am Superintendent of Public Instruction.

Q. Of the Commonwealth of Pennsylvania?

A. Of the Commonwealth of Pennsylvania.

Q. How long have you been Superintendent of Public Instruction of Pennsylvania?

[fol. 163] A. About two and a half years.

Q. And your general offices are in Harrisburg?

A. Yes, sir.

Q. Does your office rate a cabinet position in the government?

A. Yes, it does.

Q. So that you are presently a member of the cabinet of the present administration, is that correct?

A. Yes, sir, that is right.

Q. Now, Dr. Boehm, would you be good enough to give me for the record the benefit, briefly, of a statement of your educational background and the positions of teaching or otherwise which you have held up to the time you became Superintendent of Public Instruction.

A. I am a graduate of normal school, the Franklin & Marshall College, Teachers College. I received my doctorate from Rutgers University.

Q. Could you tell us when you graduated from Teachers College?

A. Teachers College was 1926.

Q. And then Columbia University?

A. I mean, that is the Teachers College of Columbia.

Q. Teachers College of Columbia, 1926?

A. That is right.

[fol. 164] Q. Rutgers when?

A. About 1936.

Q. And what degrees did you have from Rutgers, did you say?

A. Doctor of education.

Q. From then did you go into the teaching profession?

A. Well, I had been teaching prior to that time and then I became a supervising principal, Assistant County Superintendent, County Superintendent, before I held my present position.

Q. Have you therefore been constantly in the educational system of the Commonwealth of Pennsylvania since your graduation from school or college?

A. No, not since graduation from college but graduation from Columbia.

Q. From Columbia. That was 1926?

A. 1926, that is right.

Q. So that from 1926 to date you have been in the educational system—

A. In Pennsylvania, yes, sir.

Q. —in Pennsylvania.

Are you a member of any educational associations or societies?

A. I think I belong to the usual organizations in the administrative field and curriculum of the State, Local and National.

[fol. 165] Q. Would that include the Pennsylvania County Superintendents Association?

A. Yes, it would.

Q. The NEA?

A. That's right.

Q. That is the National Educational Association?

A. Yes.

Q. And the PSEA?

A. Yes.

Q. And that is the Pennsylvania—

A. State Educational Association.

Q. And the AASA is what?

A. Yes, sir, the American Association of School Administrators.

Q. And you are a member of those associations?

A. That's right, sir.

Q. Dr. Boehm, in your official capacity as Superintendent of Public Instruction you are familiar with the statutory provision for the reading of ten verses of the Bible, the



Holy Bible, without comment at opening exercises of the public schools in the Commonwealth?

A. Yes, I am.

Q. May I ask you now whether during the time that you have been in the educational system of Pennsylvania, which [fol. 166] I think goes back to about 1926, the practice of reading the Bible has been in operation?

A. Yes, sir.

Q. The Act, of course, was passed in 1913, so that ever since you have been in the system, it has been practiced pursuant to the Act, is that correct?

A. Yes, it has, yes.

Q. Now, will you tell us whether in all of your experience in the educational system, including the last two years and a half as Superintendent of Public Instruction, you have ever had occasion to have anyone complain to you of the practice of reading the Bible as provided for in the Act of Assembly.

A. I never have.

Q. Does that include also the time from 1926 until the time you became Superintendent of Public Instruction?

A. Yes, sir, it does.

Q. Dr. Boehm, have you formed any opinion based upon your career in public education as to whether the practice of Bible reading now pursued under the Act of Assembly possesses any education value?

A. Yes, I have.

Q. Will you tell us what your opinion is.

A. I think that the reading of the Bible, ten verses with [fol. 167] out-comment in the morning of each day, places upon the children or those hearing the reading of this, and the atmosphere which goes on in the reading, is one of the last vestiges of moral value that we have left in our school system. This stands out as a strong contradiction to the materialistic trends of our time.

Q. And that is your opinion as Superintendent of Public Instruction, is that correct, Doctor?

A. Yes, it is.

Q. Now, may I ask you whether you have any opinion as to the effect upon the educational system should this

practice of Bible reading as prescribed by the Act be taken away.

A. I have. I know of nothing at this time which could replace the reading of the Bible.

Mr. Rhoads: Cross-examine.

Cross examination.

By Mr. Sawyer:

Q. Dr. Boehm, are you familiar with the fact that there are a number of other states which do not permit the reading of the Bible in public schools?

A. Yes.

Q. Is it your testimony that the moral caliber or standing of the children in those states is lower than it is in Pennsylvania?

[fol. 168] A. I have no evidence.

Q. Dr. Boehm, could you tell me, if you know, whether or not it is customary in the school districts of the Commonwealth generally to also say the Lord's Prayer?

A. I would say from general knowledge, yes.

Q. Do you know how that practice was initiated and by whom?

A. No.

Q. Have you ever yourself issued any directive, order, advice or a letter of any kind which stated that was to be the practice at the time the Bible was also read?

A. No.

Q. Would the election as to whether or not the Lord's Prayer were to be said or not be said reside in the principal of the school, the individual teacher, the superintendent of the district, the Board of Public Instruction or Public Education, or in someone in your office in Harrisburg?

A. Presumably this would be a matter of the Board of School Directors.

By Mr. Rhoads:

Q. That is the local Board, do you mean, Doctor?

A. The local Board of School Directors, yes, sir, on the general theory that they have the power to set up the poli-

cies and regulations for the conduct of the local schools, apart from anything that does not violate the law or any [fol. 169] regulation of the Department of Public Instruction.

By Mr. Sawyer:

Q. But generally speaking it is your department, is it not, that has charge of what curricula is to be followed in the public schools of the state?

A. We have statutory requirements to provide broad outlines, but the Superintendent of Schools, either county or district, is charged with the responsibility to amplify and adapt the courses of study to the local districts.

Q. Suppose, Doctor, that other religious practices were initiated in a particular district, such as the singing of hymns, the saying of prayers other than the Lord's Prayer—I am just giving you examples—would that be a matter which would be of interest to and within the cognizance of your department?

Mr. Rhoads: I think that I want to register an objection to that, Henry, not to prevent his answering but simply in accordance with the Judge's instructions yesterday.

Go ahead, you may answer any way you want.

A. I would presume the Superintendent of Public Instruction, that unless there was a question raised with the Department or the Attorney General, this would come within the scope of the local School Board:

[fol. 170] By Mr. Sawyer:

Q. Now, Doctor, I take it from what you have said—but I will ask you—does your office suggest or prescribe any method, any manner in which the ten verses of the Bible are to be read?

A. Not in the two and a half years which I have been there.

Q. Is it your office that selects the King James Version of the Bible as the one that is to be read?

A. No.

Q. Is that again a matter of the Superintendent of the School District?

A. Unless the Board has any regulations, I would presume that the Superintendent makes available any official copy of the Bible.

Perhaps you should delete the word "official." I don't know that there is anything official, just the word "Bible."

Q. That is, in the absence of an expression of direction on the part of the local School Board the matter of selection would fall as one of the comprehensive over-all duties of the Superintendent of the particular district?

A. Yes. It could even fall upon the responsibility of the teacher if the Superintendent hadn't made any selection.

Mr. Sawyer: I think that is all I have.

[fol. 171] Mr. Rhoads: May I just ask one or two further questions.

#### Redirect examination.

By Mr. Rhoads:

Q. Dr. Boehm, in view of Mr. Sawyer's question directed to you with reference to whether any instructions relative to the reading of the Holy Bible pursuant to the Act of Assembly had been issued during your time as Superintendent of Public Instruction, I show you what purports to be a portion of the report of your predecessor, or a predecessor of yours, Nathan C. Schaffer, Superintendent of Public Instruction of Pennsylvania for the year 1913, and ask you whether you are familiar with the fact that such instructions in point of fact were issued after the Act of Assembly was passed.

A. Yes, I was.

Q. I believe you do not have with you either the original or a copy of Dr. Schaffer's instructions, have you?

A. I do not.

Mr. Rhoads: I now ask that the copy of the instructions of Dr. Schaffer of 1913 be marked Defendant's Exhibit 9-A.

Mr. Sawyer: I object to that subject to or on the basis

of questions that I would like to ask Dr. Boehlin on this [fol. 172] particular matter here.

Do you want me to ask those questions now?

Mr. Rhoads: Surely, go ahead.

(Carbon copy of excerpt from brief filed on behalf of Commonwealth of Pennsylvania, as Amicus Curiae, before the Supreme Court of the United States, October Term 1951, No. 9, in the Matter of Doremus v. Board of Education, et al., at pages 3 and 4, was marked Defendant's Exhibit 9-A.)

Recross examination.

By Mr. Sawyer:

Q. Doctor, you testified you were aware of this?

A. That's right.

Q. When did you first become aware of it?

A. Well, I have been aware of that for a long time. I reviewed it in the last week.

Q. When was the first time you ever read it, sir?

A. Well, the first time I read it was when I went over the history of education in Pennsylvania and I went through all of the reports of the Superintendents about ten years ago.

By Mr. Rhoads:

Q. Your preceding Superintendents, you mean?

A. Yes, that is right.

By Mr. Sawyer:

Q. Did you take any action as a result of that?  
[fol. 173] A. No, I did not.

Q. Did you ever promulgate, reissue this?

A. No.

Mr. Sawyer: Then I object to it as introduced. I register that objection subject to it being argued later.

Mr. Rhoads: Is that all, Henry?

Mr. Sawyer: Yes.

Mr. Rhoads: Thank you very much, Doctor.

(Signature waived.)

[fol. 174]

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

**Transcript of Trial of November 25, 1962**

[fol. 175] Before Hon. John Biggs, Jr., Chief Judge,  
Third Judicial District, Hon. C. William Kraft, Jr., District  
Court Judge, Hon. William H. Kirkpatrick, District Court  
Judge.

## APPEARANCES

Present: Henry W. Sawyer, 3rd, Esq., and Wayland H.  
Elsbree, Esq., for the plaintiffs.

C. Brewster Rhoads, Esq., Robert T. McCracken, Esq.,  
Percival R. Rieder, Esq., Philip H. Ward, Esq., and Sidney  
L. Wickenhaver, Esq., for the defendants.

Thomas D. McBride, Esq., Attorney General of the Com-  
monwealth of Pennsylvania, Harry J. Rubin, Esq., and  
Lois G. Forer, Esq., Assistant Attorneys General, for the  
Commonwealth of Pennsylvania.

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Third Day

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[fol. 186] Evidence on Behalf of the Defendants

MILTON EDWARD NORTHAM, having been duly sworn, was  
examined and testified as follows:

Direct examination.

By Mr. Rhoads:

Q. Dr. Northam, will you keep your voice up so that all  
of Their Honors can hear distinctly what you say, if you  
please.

Dr. Northam, where do you live, sir?

A. At 373 Roberts Avenue in Glenside.

Q. Pennsylvania?

A. Pennsylvania.



Q. When were you born?

A. August 14, 1911.

Q. Where?

A. In Chester, Pennsylvania.

[fol. 187] Q. What is your present occupation?

A. I am principal of the Huntingdon Junior High School in Abington School District.

Q. How long have you been principal of the Huntingdon Junior High School?

A. This is my third year.

Q. Would you give us just briefly but factually your educational background and your experience in teaching or otherwise?

A. I attended the public schools of Chester, Pennsylvania, graduating from the Chester High School in 1930 with a college preparatory diploma. In September of 1930 I entered Dickinson College in Carlisle, Pennsylvania, graduated in 1934 with an AB Degree and a college provisional certificate to teach English and social studies in the public schools of Pennsylvania. From 1934 to 1938 I was employed by the Masonite Corporation of Chicago as a sales promotion representative. In 1938 I became a teacher of social studies at the Smedley Junior High School in Chester, Pennsylvania, and I taught there until 1952. In 1941 I received a Master of Science Degree in Education from the Graduate School of Education of the University of Pennsylvania. In 1952 I was employed by the Abington School District as assistant principal of the Abington Senior High School. In [fol. 188] 1955 I was appointed principal of the Abington Junior High School and in 1956 principal of the Huntingdon Junior High School.

Q. So that since roughly 1930, I believe you indicated, you have been in the school system of the Commonwealth of Pennsylvania?

A. Yes.

Q. Now, in the Abington Junior High School over which you are now principal are either of the Schempp children students in your school?

A. That is the Huntingdon Junior High School I am now principal.

Q. Huntingdon Junior High. I beg your pardon. It is in Abington Township?

A. Yes, sir, Donna and Roger Schempp are students.

Q. Dr. Northam, in the Huntingdon Junior High School it has been testified that there is a practice of Bible reading pursuant to the Act of Assembly; is that correct?

A. Yes.

Q. Could you briefly describe that practice as you observe it and have observed it in the Huntingdon Junior High School?

A. Each day at the opening of school there is a Home Room period of approximately eight minutes in which we have Bible reading, the Lord's Prayer and the salute to the flag. The Bible is read sometimes by the teachers, some- [fol. 189] times by the students.

Q. And is it read with or without comment?

A. It is read without comment, sir.

Q. Dr. Northam, do you happen to know what version of the Bible, if any, is being used in the Huntingdon Junior High School?

A. Through the School District we furnish a Bible; it is labeled the Holy Bible, the King James version.

Q. Dr. English has just presented me with a copy of a book which purports to be Holy Bible, King James Version, American Bible Society on the flyleaf; on the cover the imprint Holy Bible, and on the flyleaf the statement "The Holy Bible containing the Old and New Testaments, translated out of the original tongues and with the former translations diligently compared and revised, set forth in 1611 and commonly known as the King James version," with the imprint of the American Bible Society, instituted in the year 1816, New York, at the foot of the page. I will ask you whether that is the Bible which is in general use in the Huntingdon Junior High School, to your knowledge.

A. Yes, sir, it is.

Mr. Rhoads: I now ask that this document noted as the Holy Bible, and just referred to in colloquy with the witness, be marked for identification as Defendants' Exhibit [fol. 190] No. 2.

(A book entitled "Holy Bible, King James Version, American Bible Society," was marked Exhibit D-2 for identification.)

The Court: Admitted.

Mr. Rhoads: Thank you, sir.

By Mr. Rhoads:

Q. Dr. Northam, could you give us an estimate of the number of children in your school, Huntingdon Junior High?

A. 1,022.

Q. And since you have been principal of the Huntingdon Junior High School has that school population increased or decreased or is it about the same?

A. Since the three years of our existence it has been as high as 1,076.

Judge Kirkpatrick: You apparently are leaving the actual exercises. I was wondering—

Mr. Rhoads: Please, I am sorry, sir. I am afraid I interrupted myself. I did want to ask the doctor that. Would Your Honor be good enough to do so then?

Judge Kirkpatrick: I don't know whether you have in mind what I have but I wanted to know who selects the passages to be read, how they are selected.

The Witness: Whoever is reading the Bible, sir.

[fol. 191]

By Judge Kirkpatrick:

Q. That is a student, if it is handed to the student he can read any ten verses that he wants to?

A. It is his choice.

Q. If the teacher reads it, he or she—

A. Yes.

By Judge Biggs:

Q. Who makes the selection as to which of the pupils shall read the Bible?

A. Well, there are various techniques. Sometimes a teacher will set up a program in the room where it goes up and down the aisles of the room, other times it will be on a voluntary basis. There is no set pattern that I know of.

By Mr. Rhoads:

Q. Is there any set method by which any teacher or group of teachers selects the particular ten verses to be read every morning either by the student or the teacher?

A. None, sir.

By Judge Kirkpatrick:

Q. Does this period have a term supplied to it commonly?

A. Commonly in my own terminology I call it the Home Room Period. Once in a while we refer to it as Opening [fol. 192] Exercises, sometimes A.M. Home Room as opposed to P.M. Home Room in the afternoon.

Judge Kirkpatrick: Didn't somebody in the earlier part of the case call it something else, Devotion or—I don't remember the term.

Judge Biggs: Devotional Period.

By Judge Kirkpatrick:

Q. Wasn't there a term like that sometimes used?

A. I don't know; it could be but not in my own experience in labeling my bell schedule, and so forth. I don't recall any.

Judge Biggs: Well, the record will show it.

Judge Kirkpatrick: Yes. I had a recollection—

Mr. Rhoads: May I help to clear that up, if Your Honors please?

By Mr. Rhoads:

Q. Dr. Northam, I show you what is called "Employees' Handbook and Administrative Guide, Abington Township School District, Abington, Pa., 1956-1958." Are you familiar with that document?

A. Yes, sir.

Q. Is that a document which has been circulated to all [fol. 193] employees, teachers and superintendents in the district?

A. That's right.

Q. Now, I refer you to Page 37—

Mr. Sawyer: May I see it, Mr. Rhoads, please?

Mr. Rhoads: I beg your pardon.

(Document above referred to is handed to Mr. Sawyer.)

By Mr. Rhoads:

Q. I refer you to Page 37 of this Employees' Handbook and Administrative Guide and direct your attention to that portion which refers to "Teachers-Professional Obligations" and will ask you if you will be good enough to read No. 1 and No. 2 to Their Honors.

A. "No. 1. Comply with the state regulation in reading at least ten verses of Scripture each morning without comment. This is to be followed by the Lord's Prayer.

"No. 2. Repeat the official Flag Salute."

Q. And then there is noted the well known official flag salute; is that correct, Dr. Northam?

A. That's right.

Q. And those are directives to the teachers of the Abington School District regarding what is called "Opening Exercises;" is that correct, sir?

A. That's right, sir.

[fol. 194] Mr. Rhoads: I now ask that this document be marked for identification as Defendants' Exhibit No. 3. It will be further identified by the superintendent.

(A book entitled "Employees' Handbook and Administrative Guide of the Abington School District, Abington, Pennsylvania, 1956-1958," was marked Exhibit D-3 for identification.)

Judge Biggs: Have you any objection?

Mr. Sawyer: No, indeed, Your Honor.

Judge Biggs: All right. Let it be admitted.

By Mr. Rhoads:

Q. Dr. Northam, in the years in which you have been associated with the school system of Abington Township, and particularly within the last two and a half or three years when you have been principal of Huntingdon Junior High School, will you tell us whether you have received any personal complaint with reference to the practice of reading the portions of the Holy Bible at opening exercises.

A. I have never received any complaint.

Q. Has the practice of so reading portions of the Holy Bible been in uniform operation since you have been in Abington School District?

A. Yes, sir.

Q. Has it been so in operation since you have been in the [fol. 195] school system of the Commonwealth of Pennsylvania?

A. Yes, sir.

Mr. Rhoads: Cross-examine.

Cross examination.

By Mr. Sawyer:

Q. Dr. Northam, I invite your attention not specifically to the whole but shorter period known as the Home Room Period but to merely that portion of it in which the Bible is read and the Lord's Prayer is said. Did you not ever hear that particular portion referred to about the school as the Morning Devotions?

A. No, sir.

Q. Do you know, sir, what the origin of the directive to recite the Lord's Prayer is?

A. No, I do not know the origin.

Mr. Sawyer: No further questions.

Mr. Rhoads: If the Court will, permit me to ask one further question of the witness—

Judge Biggs: Certainly.

Redirect examination.

By Mr. Rhoads:

Q. I neglected to ask whether you have had any complaints during the time that I inquired about regarding the saying of the Lord's Prayer.  
[fol. 196] A. None, sir.

Mr. Rhoads: That is all. Thank you.

Judge Biggs: Thank you, Doctor.

Mr. Rhoads: Dr. Stull.



W. EUGENE STULL, having been duly sworn, was examined and testified as follows:

Direct examination:

By Mr. Rhoads:

Q. Dr. Stull, where do you live, sir?

A. I live at 449 Abington Avenue in Glenside, Pennsylvania.

Q. How old are you?

A. Forty-three.

Q. Where were you born?

A. Zieglersville, Pennsylvania.

Q. That is Mifflin County, isn't it?

A. That is.

Q. You have been a resident of Pennsylvania all your life?

A. With the exception of two years.

Q. Will you tell us what is your educational background, if you please, briefly but as fully as you feel necessary.

A. I graduated from the high school in Milroy and from [fol. 197] Penn State University with a Bachelor's Degree in 1937. I received my Master of Education Degree from Penn State in 1942 and a Doctor of Education Degree from Temple University in 1951.

Q. When did you go into the educational system, the public school system?

A. In the fall of 1937 I began teaching in Denton, Maryland.

Q. And have you been teaching ever since except for those two years that you spoke about?

A. Those are the two years that I had reference to, sir, when I was out of state.

Q. Were you still teaching though during that time?

A. That is right.

Q. When did you come to Abington?

A. September, 1939.

Q. And in what school?

A. I came to the Abington Junior High School as a teacher of mathematics.

Q. Stayed there how long?

A. Seven years.

Q. Then went where?

A. The Roslyn Elementary School in Abington Township as principal.

Q. And stayed there for how long?

[fol. 198] A. Six years and a half.

Q. And following that what did you do?

A. Associate principal of the Abington Junior High School for one-half year.

Q. And that was in 1953?

A. Yes, the latter part of the school year '52 and '53.

Q. And from there you went to another part?

A. I assumed the principalship of that same school for the next two years.

Q. And then you went on to your present job which is principal of the Abington Senior High School; is that correct?

A. That is correct, sir.

Q. Now, in connection with your service in the Abington School District, have you become familiar with the practice of reading portions of the Holy Bible at so-called "Opening Exercises" of the school?

A. Yes, sir.

Q. Will you describe to Their Honors the character of that particular exercise, how it is done and what happens?

A. Presently?

Q. Yes, sir.

A. This is the third year we have been in our new senior high school and therefore our practice has deviated somewhat from the other schools which do not have a public [fol. 199] address system. In our school we have a class called The Radio and Television Workshop and this—

Q. Under whose supervision?

A. Under one of my teachers, a Mr. Young, who is present in the courtroom this morning.

Q. Right.

A. And this group of young people have charge of the Opening Exercises. So each morning at 8:15 they assemble in our studio and during this period the Bible is read, the

prayer is prayed, the flag is saluted and pertinent announcements to the school life are made.

Q. And that is over the public address system which is a room of its own; is that correct?

A. The studio is a room of its own but the public address system goes into every room.

Q. And, therefore, there is no general assembly presently in the Abington Senior High School at which this Bible reading, speaking the Lord's Prayer and flag salute take place?

A. No, sir.

Q. Are you familiar with the method by which the selections to be read are made?

A. Yes, sir.

Q. Could you describe it to Their Honors how that is done?

[fol. 200] A. The student who is reading the Bible on any particular morning uses his or her own passage. However, if they have no selection of their own they are free to look on any ready reference for a suggested list. But they have the entire leeway to read what they want to each morning.

By Judge Biggs:

Q. Any reference, any ready reference, what do you mean by that?

A. I mean sometimes in a roll book which is commonly used in Pennsylvania there may be something like suggested Bible readings.

By Mr. Rhoads:

Q. Will you tell us, Dr. Stull, whether the children are permitted to consult with their parents with reference to the verses which are to be read by them if they have been assigned the reading.

A. They are, sir.

Q. And do you know that of your own personal knowledge or from Mr. Young?

A. From Mr. Young.

Q. But you were advised by the person in charge of that program that that is the case; is that correct?

A. Yes, sir.

Q. Dr. Stull, will you tell us what is the present student [fol. 201] population of the Abington Senior High School?

A. I would say as of this morning about 1,830 students.

Q. And since you have been principal of that school has that population increased substantially or decreased?

A. It has increased substantially.

Q. Since 1955? is that correct?

A. Yes, sir.

Q. Will you tell us whether in your experience in the Abington School District you have at any time ever received any complaints with reference to the practice of reading portions of the Bible, as it has been described by you and others, at Opening Exercises of the schools in Abington Township?

A. I have not.

Q. Will you tell us whether you have ever received any complaint with reference to the practice of reciting the Lord's Prayer as you have described it?

A. Indirectly.

Q. Indirectly? Well, when you say "indirectly," what do you mean?

A. Through my assistant.

Q. Through your assistant?

A. Yes, sir.

Q. But not directly to yourself?

[fol. 202] A. That is right.

Q. Now, the complaint to which you referred as having come to you indirectly is the complaint which is involved in this particular case, is it not?

A. I think so.

Q. That is the Schempps. And outside of the issue which has been raised by this case in which you are now testifying, have you had any complaints with reference either to the Lord's Prayer or to the reading of the Bible?

A. None whatsoever.

Q. Would you know of your own knowledge, Dr. Stull, how the children are selected to read the Bible or would that be under Mr.—

A. I think Mr. Young could probably explain that better than I.

Mr. Rhoads: Thank you. That is all. Cross-examine.

Cross examination.

By Mr. Sawyer:

Q. Dr. Stull, was it your understanding that the complaint to which you referred was only directed to the Lord's Prayer?

A. It was, sir.

Q. And it was your understanding that it was not concerned with the Bible reading?

[fol. 203] A. I had no knowledge that it was concerned at all with the Bible reading.

Q. This roll book that you mentioned, Doctor, could you tell me a little bit more about that? What book is that and by whom is it published?

A. I can't tell the publisher but I believe we have a copy.

Q. Is it a book that comes to you through the School District of Abington or from the State Superintendent of Public Instruction? I just don't—

A. From the usual supplier of educational articles. In other words, the state does not issue us roll books.

Q. Now, this roll book is a purchase which is made by your school or by you— Who procures this roll book?

A. I assume the business manager of the district.

Q. The business manager of the district. And this roll book you say has in it suggested Bible readings?

A. I have seen roll books with suggested Bible readings in them, yes, sir.

Q. Are you familiar with the roll book that is used in your school?

A. A roll book is not used for assignments, sir. The students have leeway to choose whatever they want to choose. But I would say that I assume these roll books are [fol. 204] available if they do not know what to read.

Q. I can see I am not clear just what it is. Is this a book that is used by the faculty or by the students?

A. The faculty.

Q. By the faculty?

A. Yes.

Q. Now, with regard to that, is there a uniform roll book that is used by the faculty in your high school?

A. Yes.

Q. They all use the same book?

A. In any particular year, sir.

Q. In any particular year. And you mentioned to us that this roll book has in it suggested Bible readings?

A. I believe so, yes, sir.

Q. Do you know under whose aegis those selections are made?

A. I do not.

Q. Do you know whether they reflect the particular times of the year? Would there be passages at Christmas time?

A. I am not sure.

Q. Well, I wonder if you could procure such a book for us to examine. Could you, Doctor?

A. I could.

Judge Biggs: Is there one in the courtroom?

[fol. 205] Mr. Rhoads: I don't know. This is the first time that I have heard about the roll book but if there is one in the courtroom we shall produce it.

I will get it for you right now, sir.

Judge Biggs: Thank you.

By Judge Biggs:

Q. Are the names of the pupils kept in it; is that why it is called the roll book?

A. Yes.

Q. And what else does it have in it?

A. That is all there is. There are blanks.

Q. Blanks for their names. Is there a calendar in it? I assume there is. Is there a calendar in it?

A. Yes, sir, I believe so.

Mr. Rhoads: May I just produce this?

I am producing, sir, from the kit of Mr. Young, who will testify shortly, what purports to be "Squibb's Class Record



Book No. 9, W. W. Young, Teacher," on the first leaf of which I find "Suggested Scripture Selections for use in Public Schools."

Judge Biggs: Suppose we have it marked for identification and then if Mr. Young is to testify about it perhaps it might be more desirable.

Mr. Rhoads: Yes.

[fol. 206] Mr. Sawyer: Who shall mark it?

Judge Biggs: Let it be marked.

Mr. Rhoads: I will mark it myself.

(A book entitled "Squibb's Class Record Book No. 9 W. W. Young, Teacher," was marked Exhibit D-4 for identification.)

By Mr. Sawyer:

Q. Dr. Stull, I am sure you have seen this before, but showing you D-4, could you then read to us by whom that book is published?

A. Alva M. Squibb, 918 Park Street, McKeesport, Pennsylvania.

Q. And this is a private printer and publisher to your knowledge, is it, Mr. Stull?

A. To the best of my knowledge it is.

Q. And there is nothing in that book that has any official imprint of the State of Pennsylvania or the particular township in which your school is located; is that correct?

A. No.

Mr. Sawyer: No further questions.

Mr. Rhoads: That is all. Thank you.

Judge Biggs: Thank you, Doctor.

Mr. Rhoads: Mr. Young.

[fol. 207] WILLIAM WINSTON YOUNG, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Rhoads:

Q. Mr. Young, where do you live?

A. 697 Seimbrook Court, Treviso, Pennsylvania.

Q. How old are you?

A. Thirty.

Q. What is your present occupation?

A. School teacher.

Q. Where?

A. At Abington Senior High School.

Q. How long have you been teaching at the Abington Senior High School?

A. Since September of 1955.

Q. What is the nature of your teaching activity?

A. English.

Q. What is your general educational background, sir?

A. I graduated from Frankford High School in Philadelphia in 1946, and from there I went to the University of Pennsylvania from which I got my Bachelor's Degree in 1950, and then I got my Master's Degree in Education in 1951.

Q. When did you start teaching?

A. In September of 1951.

[fol. 208] Q. And you have been teaching ever since?

A. That's right.

Q. And in addition to your work as a teacher in English in the Abington School System, do you have any other activities which have been assigned to you?

A. Yes. I sponsor the yearbook, I sponsor the Honor Society, I sponsor the junior class, and in connection with my course in radio and television I am in charge of the morning program that has been referred to before.

Q. Will you just describe to Their Honors exactly what you mean by the "morning program."

A. As Dr. Stull outlines, between 8:15 and 8:30 in the morning, while the students are in their home rooms or

advisory sections, over the public address system we have a morning program which includes the Bible reading, the Lord's Prayer, the flag salute and the announcements for that particular day.

Q. Is that part of the teaching program of the school with reference to the occupation of television and radio work?

A. That's right. The personnel of this morning program are drawn from the courses in radio and television that I teach.

Q. Yes. Now, directing your testimony specifically to the question of Bible reading and the saying of the Lord's [fol. 209] Prayer, will you tell us just exactly what takes place in your radio and television room in the mornings at the opening exercise.

A. The student sitting at a table with the microphone announces the Bible, the part of the Bible that he is going to read, and then he proceeds to read that, after which he asks the students in the rooms to stand and join in the Lord's Prayer. He begins that and they follow in their Home Rooms. And then a second student leads the salute to the flag thereafter.

Q. How are those students who give the Bible reading in the morning selected?

A. They are assigned so that every student taking the course will during the term of the course have several opportunities to perform each part of the morning program.

Q. That is the reading of the Bible as you have described?

A. That's right. One student reads the Bible, another does the flag salute and the third reads the announcements.

Q. And is any specific Bible directed to be read, that is as far as the relation between the school and the scholar is concerned?

A. No. The Bibles available in the school are the King James version; however, my direction is that the student practice whatever selection he has taken from the Bible that he has in his home. He knows in advance that he is going to [fol. 210] do this so he prepares it. And generally they use the Bible that they are familiar with in their home.

Q. And use it by what, bringing it to school?

A. They bring it with them that day, generally speaking.

Q. Have you had any experience to your own personal knowledge of children reading their own Bibles, bringing them from home and reading them, reading the selected verses from the Bible in the morning?

A. Yes. Regularly, as long as we have been doing this over the past three years, we have had Jewish students bring in the Bibles from their homes, Catholic students bring in their own, and sometimes those who read the King James version bring their own in, other times they use the one that is available there.

Q. Did you bring with you any Bibles to illustrate the point that you are making, that other than the King James version have been used?

A. Yes. "In my briefcase I have all four that we have used.

Q. May I hand you your briefcase, Mr. Young, and let you select from that the documents to which you are referring?

A. This is the King James version that is available in the school.

Mr. Rhoads: Identified as Defendants' Exhibit No. 5.

[fol. 211] (A book entitled "The Holy Bible, Containing the Old and New Testaments," was marked Exhibit D-5 for identification.)

The Witness: This is the Catholic version of the Bible that has been used on occasion by one of the students in the course.

By Mr. Rhoads:

Q. Do you know the name of the student?

A. Yes, Frank McLaughlin.

Q. And is that his Bible?

A. It is.

Q. And you have brought it into court with his permission?

A. That's right.

Mr. Rhoads: I ask that that be marked for identification.

(A book entitled "The Holy Bible, Translated from the Latin Vulgate," was marked Exhibit D-6 for identification.)

Judge Biggs: How is that Bible named on its title page?

Mr. Rhoads: It is designated on the flyleaf, sir, "The Holy Bible, Translated from the Latin Vulgate, Diligently Compared with the Hebrew, Greek, and Other Editions in Diverse Languages, the Old Testament First Published by [fol. 212] the English College at Douay, A. D. 1609 and the New Testament First Published by the English College at Rheims, A. D. 1582, with Annotations, References, and an Historical and Chronological Table," and then I don't think you are interested, sir, in what is at the bottom of the page.

Judge Biggs: No. I merely wanted it so that we would have no difficulty in identifying it.

Mr. Rhoads: And with a cross imprinted on the cover, if Your Honors please.

The Witness: The third one is The Holy Scriptures, and this is an actual Bible that has been brought in by Jewish students. This belongs to Linda Bruner.

By Judge Biggs:

~~Q. And has been used?~~

A. Yes, it has, sir.

By Mr. Rhoads:

Q. And is she a Jewish scholar?

A. Yes, she is.

Q. Is the McLaughlin boy a Catholic student?

A. Yes, he is.

Q. Is this Bible now which we will identify as Defendants' Exhibit 7 the property of the little girl Linda Bruner?

[fol. 213] A. Yes, it is.

Q. And did you bring it in with her permission?

A. Yes, I have.

Mr. Rhoads: And for Your Honors' information, Linda Bruner is written in the flyleaf.

Judge Biggs: That sufficiently identifies it.

Mr. Rhoads: And the title is a Jewish inscription at the top, which I would not venture to translate, sir, then underneath that "The Holy Scriptures According to Masoretic Text, a New Translation, with the Aid of Previous Versions and with Constant Consultation of Jewish Authorities," at the bottom "Philadelphia, The Jewish Publication Society of America, 5715-1955."

(A book entitled "The Holy Scriptures According to the Masoretic Text, a New Translation," was marked Exhibit D-7 for identification.)

The Witness: I have one more. The Revised Standard Version has also been used on occasion.

Mr. Rhoads: The witness is now producing what purports to be a volume "Holy Bible," Revised Standard Edition, published by Thomas Nelson and Sons, New York, Toronto, Edinburgh, 1952. Would Your Honor like the inscription also?

[fol. 214] Judge Biggs: I think it is sufficiently identified.

(A book entitled "The Holy Bible, Revised Standard Version, Containing the Old and New Testaments," was marked Exhibit D-8 for identification.)

By Mr. Rhoads:

Q. Mr. Young, can you inform the Court as to how the selections which are read—

Judge Biggs: Do you offer these in evidence?

Mr. Rhoads: I offer them in evidence. I might as well offer them now, sir. I do.

Judge Biggs: Any objection?

Mr. Sawyer: No, sir.

Judge Biggs: Admitted.

By Mr. Rhoads:

Q. Can you give Their Honors some information as to how these verses which are read in the morning are actually selected?



A. I inform the students that they are to read ten verses and the verses they read are up to them. However, I have made available the list that is in my roll book, if they wish to select from that.

Q. And do they select from that, according to your own experience, or not?

[fol. 215] A. Sometimes they do. I would say, at least half the time they take the suggestion from this.

Q. From what?

A. From the list in the roll book.

Q. From the list in the roll book?

A. That is correct.

Q. Will you tell us something about the roll book that you have there. Is that an official document of the School District of Abington Township? What is it?

A. Yes, this is a roll book that was issued by, in my case, the head of the English Department.

Q. And what is the function of the roll book, just so we may understand it?

A. To keep a record of the students' grades throughout the year.

Q. And it so happens that in the flyleaf there are these suggested readings; is that correct?

A. Yes, that is correct, sir.

By Judge Biggs:

Q. Can each student look for his or her grade by examining the roll book?

A. No, they don't look at the rest of the book, they just look at this introduction if I happen to have that with me. But I take the liberty of clipping these suggestions from [fol. 216] two other roll books so that I have one available in the studio where the Bible is read and also one available in the room in which I teach. They generally look at those rather than the actual one in the roll book.

By Mr. Rhoads:

Q. And are they posted or hung in some conspicuous place, is that it, or how do the students get at it?

A. In both places they are on the bulletin board. I be

lieve, along with the schedule of who is to be on that morning program.

By Judge Kirkpatrick:

Q. Do the students get it the day before?

A. No, they are selected more in advance of that, generally a month in advance.

By Mr. Rhoads:

Q. And is it part of your curriculum that they practice their readings before they actually go on the air, if that be the expression?

A. Yes, that is why I select them well in advance, so that they will have an opportunity of rehearsing this at home—usually they do before their parents—and then in the morning they get in before the program goes on so that I may hear their reading to help them with pronunciation, if such difficulties arise before they are actually on the [fol. 217] P.A. system.

Q. Mr. Young, during your experience in the Abington School System have you had any objection raised to you with reference to the reading, as you have described it, of the selections from the Bible in the morning or the saying of the Lord's Prayer?

A. No, sir, none at all.

Mr. Rhoads: You may cross-examine.

Judge Biggs: Before you commence your cross-examination—

By Judge Biggs:

Q. How many students in the course of the term would read from the Bible?

A. There are thirty in this course, in the Radio and Television Workshop course, and all of them have an opportunity several times a year to read the Bible.

Q. And also to say the Lord's Prayer?

A. Yes. The same student who reads the Bible leads the Lord's Prayer that day.

Q. You say it goes over the public address system and

the other students in the school follow the Lord's Prayer.  
That is follow orally—

A. Yes.

Q. —the recitation and recite it themselves?

[fol. 218] A. That's right.

Q. Just as they would with the flag salute?

A. That is correct, sir.

Q. How many terms are there?

A. How many terms?

Q. Terms in a school year?

A. Two.

Q. And each student of these thirty would do this work, you say, several times a year. Two or three times a year, do you mean?

A. More than two. I would say probably between three and five in that they would be on the morning program more times than that but they may get around to the Bible, some time, a number of times between three and five. The course runs for a full year, two terms.

Q. What about the student that gives the summary of the school's activities or pertinent notices, is he the same student?

A. No, it is a different person for each function; one for the Bible, one for the flag salute and one for the announcements.

Q. One for the Bible and the recital of the Lord's Prayer?

A. Yes.

Q. One for the flag salute and one for the announcements?

[fol. 219] A. That is correct.

Q. How do you select—you have a list of students, a roster of students that are in this course of yours. How is the first person chosen, how is the second person chosen, and so on?

A. Well, during the first week of the course, for the first couple of days in school I have auditions and tape record their voices to find out who would be best suited for the various parts, and then I assign the students parts that would be most in accordance with their ability. That is the announcements are the most difficult part, so the student who early in the year proves that he has ability in reading

things quickly and well gets the announcements, and the flag salute and the introduction, which are the easiest part of the program, would be assigned to students who have not had as much experience.

Q. You say "the introduction." What is "the introduction"?

A. The programs are numbered. At the beginning of each program we give the number and generally we have a fact, a well known fact for the day that we look up in the Almanac.

Q. And that forms part of the introduction?

A. That is the introduction.

Q. And who does that, what student does that?

A. The same student who does the flag salute.

[fol. 220] Q. The flag salute comes first?

A. No, the student who is doing that part gives the introduction and then the Bible and the Lord's Prayer follow, and then the flag salute.

Q. And then he comes back for the flag salute?

A. That's right. He also concludes the program by stating who has been on it that morning.

Q. You say you tape their voices, hear them, and then you select someone for the announcement who really is able to read quickly and well and make a proper announcement?

A. Yes, that is correct.

Q. Well, is this done alphabetically or you simply take the best man that you can find for the first day, or how do you do it?

A. It is according to ability and that follows through during the year. Of course, some of them that are not particularly good at this sort of thing in the beginning improve as the year goes by, and then they do announcements when they have improved.

Q. When you have selected your first man you gave the announcements to this year, how did you select him, the very first one in September?

A. Some of these students have taken the course a second year. You may follow through with the second year, [fol. 221] so I picked the ones whom I knew that I had had the year before.

Q. How did you pick the very first man who spoke this year on announcements?

A. He was a student whom I have had last year.

Q. Well, how did you pick him? Why did you pick him?

A. Because I knew that he would be able to do the announcements well.

Q. You considered him the best suited man in the entire group; is that correct?

A. That is.

Q. And then you went down the list according to varying abilities?

A. That is right, according to the results that I observed from the tape that I made.

Q. In other words, it wasn't done alphabetically or according to standing in the class or anything of that sort?

A. No, it wasn't. They had no standing in the class at that time.

Q. You did it on the basis of who you thought was best suited at the time?

A. Yes, that is correct.

Judge Biggs: Thank you.

By Judge Kraft:

[Vol. 222] Q. How did you do it after the first couple of weeks so that other students were afforded, as you said, three or four opportunities during the year?

A. Well, after I have heard other students do the Bible and the introductory part and the flag salute, then subsequently they are given the announcements that are the more difficult part. As they strengthen they get the more difficult part of the program.

By Judge Biggs:

Q. In other words, it is done on the basis of who in your judgment is best suited to deliver the various parts of the program orally over the microphone?

A. To a degree that is correct, although even if a student is extremely well suited to a particular part I can't assign

him that part regularly because I want everyone to have a chance.

Q. Yes, but subject to that condition?

A. Yes, that is correct.

By Mr. Rhoads:

Q. And, Mr. Young, this is all part of the educational equipment which is being given to the students in Abington Senior High School; is that correct?

A. Yes, sir, that is correct.

Q. And it is part of the curriculum which you were developing in the radio and television phase of your English course; is that correct?

A. Yes, that is correct.

Mr. Rhoads: That is all. Thank you.

Cross examination.

By Mr. Sawyer:

Q. Mr. Young, when you say you wanted to give them all a chance, I take it that you refer to all of the students who are enrolled in your class in the radio and television?

A. Yes, sir, that is right.

Q. And did you tell us how many of those students there were? How many are there enrolled in that class?

A. There are thirty this year.

Q. And is that about the average number of students in recent prior years in the past?

A. Yes, over the past three years there has been an average, a little, I would say an average of a little less than thirty.

Q. So that these arrangements and the judgments that you make with respect to who will make announcements or who will read the Bible and who will lead in the flag salute are judgments that you make within this particular class of radio and television students.

A. Yes, sir, that is correct.

Q. When was it that you commenced that particular part



[fol. 224] of your whole job at Abington? When did you first take that over, the radio and television?

A: When we moved into the building we now occupy, in September of 1956.

Q: September of 1956?

A: Yes, sir.

Q: And prior to that time I take it that this, what you have told us, did not apply because you had no public address system?

A: Prior to that time the Bible was read in the manner that Mr. Northam had outlined.

Q: And do you recall when it was after September, 1956, that you first had occasion to read other than the King James version, which you actually have at the school?

A: I would guess that it was quite early in that year, in that school year.

Q: What Bible was it on the first occasion, and how did it come about?

A: As soon as assignments were made people brought in their own Bibles, and I know that I had a number of Jewish students that year who brought their own in quite early in the year, I would say by October at the latest.

Q: Of 1956?

A: Yes, sir.

[fol. 225] Q: And had there been any policy set as to whether the children would be permitted to bring in their own Bibles, and if so by whom was it set?

A: There was no policy other than what I set, and I suggested they rehearse on the Bible that they have at home, which, of course, would result in various versions.

Q: So that your knowledge of this concept of having them practice at home was one which was initiated and really originated by you in your own class; is that correct?

Mr. Rhoads: That is not his testimony.

Mr. Sawyer: Well, let's find out what his testimony is.

Mr. Rhoads: You are putting words in his mouth.

Judge Biggs: Suppose you reframe the question. I think your intent is entirely candid but I do think it is not quite what he said. Let's see what he will say on that point.

Mr. Sawyer: I will ask the stenographer to read the preceding question and the answer. Perhaps I don't need to ask the following question.

(The reporter read as follows:—

"Q. And had there been any policy set as to whether the children would be permitted to bring in their own Bibles, [fol. 226] and if so by whom was it set?

"A. There was no policy other than what I set, and I suggested they rehearse on the Bible that they have at home, which, of course, would result in various versions.

"Q. So that your knowledge of this concept of having them practice at home was one which was initiated and really originated by you in your own class; is that correct?"

Mr. Sawyer: If that is not correct I submit, sir, the witness can correct my question, but I thought that clearly stated what he had said.

Judge Biggs: I think it is a proper question in cross-examination.

Mr. Rhoads: I will withdraw my objection, sir.

The Witness: That my policy initiated this procedure within my class, since the beginning of the Radio and Television Workshop. I don't know what policy had occurred before that.

By Mr. Sawyer:

Q. Well, there wasn't any Radio and Television Workshop that read the Bible over the public address system until you [fol. 227] had a public address system; is that correct?

A. That is correct.

Q. And that practice started as soon as you moved into the new building with the public address system?

A. That is correct.

Q. And shortly thereafter on your suggestion the children were to practice the verses at home, and that led to their bringing their own Bibles in; is that correct?

A. Yes.

Q. And were you then the originator of that policy?

Mr. Rhoads: May we suggest "Were you the originator of that practice," and I have not the slightest objection.

Judge Biggs: Well, Mr. Sawyer wants to use the word "policy." I think he is at liberty to do so.

Mr. Sawyer: I didn't realize the objection was to "policy."

Judge Biggs: I think "policy" is a very large word under the circumstances.

Mr. Sawyer: Practice.

Mr. Rhoads: That was my point that it is so large and inclusive.

By Mr. Sawyer:

Q. What I am trying to get at, Mr. Young, is that you [fol. 228] weren't directed by your principal or anyone else in the school district to carry out that practice?

A. No, I wasn't. I initiated it in connection with these students.

Mr. Sawyer: I have no further questions.

Mr. Rhoads: That is all, Mr. Young.

By Judge Biggs:

Q. Just one other question. You stated that prior to the inauguration of the public address system the students read the ten verses. Did they also at that time say the Lord's Prayer?

A. Yes, sir, they did.

Judge Biggs: Thank you.

Mr. Sawyer: Your Honors, I would like to bring Your Honors' attention and ask Mr. Rhoads if he wants to amend his answer stated that he admitted that the King James version of the Bible was read in accordance with the way we pled it, and that it was read by a student or teacher over a public address system which was broadcast to all classrooms.

Mr. Rhoads: I don't know whether it really makes very much difference, sir, because the question of proofs always goes beyond the question of the answer.

[fol. 229] Judge Biggs: The Court made no order under Rule 16 pre-trial.

Mr. Rhoads: That was my impression.

Judge Biggs: I assume that counsel would move that

the allegations correspond to the proof, which he is at liberty to do under the civil rules, and I think the Court will so treat it. Agreeable?

Mr. Rhoads: Because in point of fact, sir, I might very candidly suggest that at the time I prepared the answer the information which I put in the answer was what I thought was all-inclusive. I find, however, that we are dealing with educational practices which I want to bring out in the testimony, and I have done so.

Judge Biggs: Is that satisfactory to you, Mr. Sawyer?

Mr. Sawyer: Yes, sir.

Judge Biggs: Thank you.

Mr. Rhoads: Thank you.

Dr. English, please.

ORLANDO H. ENGLISH, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Rhoads:

[fol. 230] Q. Dr. English, where do you live, sir?

A. 1409 Highland Avenue, Abington, Pennsylvania.

Q. What is your present occupation?

A. Superintendent of Schools of Abington Township School District.

Q. For how long have you been superintendent of schools of Abington Township School District?

A. Since August 1, 1950.

Q. Dr. English, will you be good enough to give Their Honors a resume of your educational background and professional experience?

A. I attended the public schools at Camptown, Pennsylvania, and graduated from high school there. Following graduation from high school I attended the Mansfield State Normal School from 1922 to 1925, and then in 1929 I received my Bachelor of Science Degree in Education from the University of Pittsburgh. In 1932 I received the Master of Arts Degree in Educational Administration from the

University of Pittsburgh, and in 1942 Doctor of Education in Education from the University of Pittsburgh.

Q. Dr. English, when did you start or commence your professional teaching?

Judge Biggs: Just a moment. I think we will take a recess for approximately ten minutes. We will reconvene [fol. 231] at 11:25.

(Recessed at 11:15 a. m. until 11:25 a. m.)

Mr. Rhoads: I recall the witness.

Judge Biggs: Yes, please, Doctor, would you resume the stand.

ORLANDO H. ENGLISH, resumed.

By Mr. Rhoads:

Q. Dr. English, when did you start your career in the public school system?

A. I began teaching at the Ambridge Junior High School in 1925, was teacher of mathematics and science, and remained in Ambridge, Pennsylvania—

Judge Biggs: Will you keep your voice up a little bit, please, Doctor.

The Witness: —and remained in Ambridge, Pennsylvania, from 1928 to 1933 as elementary principal. In 1933 I went to West Deer Township in Allegheny County as supervising principal, and then in 1936 moved to Freeport Borough Schools as supervising principal; in 1940 I went to Brentwood, Pennsylvania, as superintendent of schools; in 1946 elected superintendent of schools at Uniontown in Fayette County, and I came to Abington in 1950 as superintendent of schools. [fol. 232]

By Judge Biggs:

Q. Did I understand you to say that one of the early schools at which you taught was in West Deer?

A. West Deer Township.

Q. — West Deer Township?

A. In Allegheny County.

Judge Biggs: Thank you.

By Mr. Rhoads:

Q. And you have been superintendent of schools of Abington Township since 1950?

A. Correct.

Q. Are you a member of any other professional associations or bodies connected with education?

A. A member of the National Educational Association, the Pennsylvania Educational Association.

Q. What is the National Educational Association?

A. It is a national professional organization of the teaching profession.

Q. And what is the other one?

A. I am also a member of the American Association of School Administrators, the National Association of Educational Research and the National Fraternity of Phi Delta Kappa and also at the present time I am a member of the [fol. 233] State Council of Education of the Commonwealth of Pennsylvania.

Q. Dr. English, are you familiar with the practice of Bible reading in the schools of Abington Township?

A. I am.

Q. And since you have been superintendent of schools has that practice of Bible reading pursuant to the Act of Assembly been a constant practice in the school system?

A. It has.

Q. Can you describe to Their Honors from your point of view as administrative head of the school system what is the practice that is approved by the school system represented by you?

A. In accordance with the Administrative Handbook that was submitted earlier, the directions in the Handbook to all professional employees that in accordance with the law's they are to read ten verses of the Bible without comment, followed by the Lord's Prayer and flag salute, and from a review of the principals of the various schools



it is my understanding that the policy is followed in all the schools.

Q. Of the Commonwealth?

A. In Abington and in all schools that I have been connected with it's been followed, in all previous—

Q. I wasn't clear whether you meant in all schools of the [fol. 234] Commonwealth or in all schools of Abington Township.

A. In all schools in Abington Township.

Q. And so far as your association with the school system of the Commonwealth is concerned, it has been followed to your personal knowledge during the time that you have been associated with the Commonwealth's school system; is that right?

A. It has been the policy in all previous school districts which I have been associated with.

Q. Dr. English, what is the student population of the Abington School District?

A. 9,033.

Q. Has that increased or decreased as a general proposition since the time you have been there, that is 1950?

A. 1950 was 4,700.

Q. And now it is some—

A. 9,033.

Q. During all of that time had you as the administrative head of the Abington School System received any complaints regarding the practice of reading ten verses of the Bible at opening exercises without comment or reciting the Lord's Prayer, as has been described?

A. I have received none.

Q. Dr. English, I show you Defendants' Exhibit No. 3, [fol. 235] being an "Employees' Handbook and Administrative Guide," and ask you whether that has been issued pursuant to your own authority as superintendent of schools of Abington Township?

A. It is issued as an administrative handbook from my office.

Q. On Page 37 under the heading of "Teachers-Obligations," "Opening Exercises," is that rule or regulation that is promulgated on Page 37 part of the administrative policy of the school district?

A. It is.

Q. Now, I show you Defendants' Exhibit No. 2, being a King James version of the Holy Bible, published by the American Bible Society, and ask you whether that is the copy of the Holy Bible which has been circulated in the schools of Abington Township for purposes of reading?

A. It is the issue that is purchased by the school district and issued to all teachers to comply with the school laws.

By Judge Biggs:

Q. Issued to all teachers?

A. To all Home Room teachers.

Q. All the professional employees?

A. Yes.

By Mr. Rhoads:

Q. By that you mean those who would be using it, is that [fol. 236] correct, Dr. English?

A. That is correct.

Q. In other words, it wouldn't be issued to a stenographer in your office?

Judge Biggs: I didn't mean that.

Mr. Rhoads: I beg your pardon, I wasn't quite sure what the doctor meant myself.

The Witness: To Home Room teachers.

By Judge Biggs:

Q. To the Home Room teachers throughout the Township in the schools?

A. That is correct.

Mr. Rhoads: You may cross-examine.

Cross examination.

By Mr. Sawyer:

Q. Dr. English—excuse me, I would like to look at that.

(Exhibit D-2 is handed to counsel.)

Mr. Sawyer: Thank you.

By Mr. Sawyer:

Q. Dr. English, has there ever been any other Bible other than that King James version there, purchased by Abington Township?

A. A check with the business office reveals that is the one that has been purchased.

[fol. 237] Q. And does that check also reveal that no other version of the Bible has been purchased?

A. According to the records that is the Bible that has been purchased.

Mr. Rhoads: I think that I may be able to stipulate with my friend that, so far as any information that we have or investigation that we have been able to make, D-2 is the only Bible involving the use of any public funds of Abington Township.

Judge Biggs: Do you accept the stipulation, Mr. Sawyer?

Mr. Sawyer: Yes, sir.

Mr. Rhoads: I simply want to make it perfectly clear, sir, so far as we know, that is, D-2 is the Bible.

Judge Biggs: The Court understands that the stipulation between counsel is that this No. D-2 is the Bible which is issued and the only Bible which has been used in so far as the superintendent is concerned.

Mr. Rhoads: Yes, sir.

By Judge Kirkpatrick:

Q. Were you familiar with the practice that one of the witnesses testified to of the students of varying faiths reading the Holy Bible of their own faith?

[fol. 238] A. I am aware of it.

Q. That is you were aware while it was going on?

A. No.

Q. Or did you just learn of it?

Q. I just learned of it at the beginning of this information.

Judge Biggs: At the beginning of this session.

By Judge Kirkpatrick:

Q. Would you be in a position to regulate that feature of the matter? Could you issue a direction to the teachers either to do it or not to do it, as you saw fit?

A. Do you mean—

Q. I mean does your position carry with it the authority to say to the teacher, you can't read anything except the King James version?

A. I question whether that is under my jurisdiction.

Q. That is what I wanted to find out.

A. Because I would only make the directive in accordance with the school law which says, "Read ten verses of the Holy Bible."

Q. But you would be the one to make the directive if there was one to be made?

[fol. 339] A. Yes.

By Judge Kraft:

Q. Do you determine what version is purchased by the school district or is that determination made by the Board of School Directors?

A. I imagine it is made by the business office and through the supply houses that supply our books of that nature.

By Judge Biggs:

Q. You say you imagine, you mean you think that is the way it is done?

A. That's right.

Q. But you are not certain about it. You don't really know.

A. No one has asked me. The Holy Bible has always been—

Q. Always been forthcoming?

A. —forthcoming, and I have asked no questions.

By Judge Kirkpatrick:

Q. Do you think that the Jewish Bible is in accordance with the directive to read the Holy Bible, in your opinion?

A. I never have questioned it.

Q. You never considered it or you have never doubted it, which do you mean?

[fol. 240] A. Never considered it.

Judge Kirkpatrick: Never considered it.

By Mr. Sawyer:

Q. I believe you have before you there, resting on the edge of the witness stand rail, the book which has been referred to here as "The Roll Book," is that correct, sir? I think you are looking at it now.

A. Yes.

Q. That is the roll book, isn't it?

A. Yes.

Q. Is that purchased under your direction or supervision, that particular publication?

A. It is a publication purchased by the school district.

Q. Well, are you the person who selects that particular roll book?

A. Frankly, I have never seen it before.

Q. You have not seen it before?

A. I knew there were roll books in the school system, but the nature of the book I have never checked.

Q. Who would it be, sir, that would make the decision as to whether that roll book published by that particular firm there in Pennsylvania or somebody else's roll book would be purchased?

[fol. 241] A. I would say it would be the business office.

Q. The business office of the—

A. —of the school district.

Q. —of the school district. That office would be a portion of your general supervision?

A. That is correct.

Judge Kraft: Mr. Sawyer, is it your contention that if this was purchased by the school district, that it was so purchased with a direction to include in it selected Bible excerpts?

Mr. Sawyer: I don't know, sir.

Judge Kraft: Or is it your view that they just ordered roll books and found on delivery that they gratuitously

included a calendar form and suggested excerpts of Bible reading?

Mr. Sawyer: That is what I don't know; that is what I am asking. I am like the superintendent of schools of Abington Township. I never saw a roll book before either, nor did I know that it had suggested texts in it, so I was really inquiring. I at this moment have no theory about it. I might have some theory about it later on in the case when I give it some thought, but I don't have any.

By Judge Biggs:

[fol. 242] Q. Could I inquire a little bit about your setup? You are the superintendent of the district?

A. That is correct.

Q. You have an office.

A. That is correct.

Q. Where is that office?

A. In the Administration Building.

Q. Where is that?

A. 1841 Susquehanna Road—Susquehanna Street.

Q. In the Township?

A. Correct.

Q. Now, your duties include general supervision?

A. Of the complete, entire school system.

Q. And you have an officer who acts as a procurement officer?

A. I do.

Q. Who is he?

A. Dr. Henry Daum.

Q. And he, for example, procured this roll book?

A. That is correct.

Q. Does he procure other supplies?

A. He does.

Q. And his duties are devoted exclusively to the business of procurement or does he have other professional duties?

[fol. 243] A. He serves as the secretary of the Board of School Directors and Business Manager of the school system.

Judge Biggs: Thank you.



By Mr. Sawyer:

Q. Dr. English, was it under your direction that in the preparation of the blue book which was referred to that the directive to read the Lord's Prayer or, excuse me, to recite the Lord's Prayer was also included in that little section?

A. That is correct. In fact, that is the same paragraph that I have used for thirty years.

Q. And do you know how you first came to add to the statutory requirement of the Bible reading the additional recitation of the Lord's Prayer?

A. I copied the same paragraph from the administrative handbook of my former superintendent.

Mr. Sawyer: Thank you very much, sir. No further questions.

Mr. Rhoads: That is all, Doctor.

Judge Biggs: Thank you, Doctor.

Mr. Rhoads: May I recall Mr. Young just for one question, sir?

Judge Biggs: You may.

Mr. Rhoads: Thank you.

[fol. 244] WILLIAM WINSTON YOUNG, resumed.

Redirect examination.

By Mr. Rhoads:

Q. Mr. Young, in your examination of a few moments ago you testified that there were about thirty students in your course; is that correct?

A. Yes, sir, it is.

Q. Will you tell us why there is such a small number of students in your course?

A. It is an elective course that comes under the heading of the English Department.

Q. And these thirty students have the privilege of electing your course; is that correct?

A. Yes, that is correct. They must take it in addition to their regular English.

Mr. Rhoads: Thank you. That is all.

Mr. Sawyer: No questions.

Mr. Rhoads: Just a minute.

Judge Biggs: Just a moment, please.

Mr. Rhoads: Thank you. That is all.

Judge Biggs: Thank you, Mr. Young.

[fol. 245] Mr. Rhoads: If Your Honors please, I am in somewhat of a predicament and place myself at Your Honors' disposal. Our next witness is Dr. Luther P. Weigle, who is Dean Emeritus of the Yale Divinity School. He is presently on his way to Philadelphia. We expected him to be here about 12 o'clock noon. I anticipated that I would have Dr. Boehm, Superintendent of Public Instruction, as a preceding witness and Dr. Weigle factually. I do not think he will be here possibly before half past twelve. I am therefore, wondering, sir, whether Your Honors could see fit to adjourn and then let us reconvene when Dr. Weigle arrives. His train is the 8:30 train from New Haven and we have somebody out meeting him now.

Judge Kirkpatrick: Is he your last witness?

Mr. Rhoads: We have Dr. Boehm, who unfortunately could not make it today but will be here tomorrow morning and he will be but ten or fifteen minutes I am sure.

Judge Kirkpatrick: May I ask another question? Is Dr. Weigle an expert witness as the Jewish scholar—I have forgotten his name.

Mr. Rhoads: Yes, Dr. Grayzel. Dr. Weigle will be testifying upon purely scholarship lines, the same general lines.

Judge Biggs: That would mean a session tomorrow [fol. 246] morning, obviously.

Mr. Rhoads: I would hope, if Your Honors please, that if we convened at say—with Dr. Boehm, yes, sir. But I would hope that if we convened at say two o'clock, that Dr. Weigle's testimony should be completed within an hour or an hour and a half I am quite confident, and I am trying to limit it and bring it to focus.

Judge Biggs: Then we will have to go over until tomorrow morning.

Mr. Rhoads: Yes, sir.

If Your Honors please, I was under the impression that Your Honors fixed today and tomorrow, did you not, sir?

Judge Biggs: Yes, we did.

Mr. Rhoads: I hoped I had not trespassed on—

Judge Biggs: No. There had been other special circumstances which developed over which you had no control. How long would Dr. Boehm take?

Mr. Rhoads: Not more than ten or fifteen minutes at the outside, sir.

Mr. Sawyer: We might be able to stipulate, sir. He is the Superintendent of Public Instruction of the Commonwealth. [fol. 247] Mr. Rhoads tells me, and I would rather think that when Mr. Rhoads says ten or fifteen minutes, they would be matters which we probably could stipulate.

Mr. Rhoads: I wouldn't be surprised, sir, that we might be able between now and reconvening be able to stipulate.

Judge Biggs: Suppose you see if you can. It would be a great convenience. But I want to make it perfectly clear that we did undertake to hear you today and tomorrow.

Mr. Rhoads: That was the only reason that I consented to Dr. Boehm even permitting—

Judge Biggs: Mr. Rhoads and Mr. Sawyer, this is not anything for which you are responsible; there have been certain special circumstances which have developed.

Suppose you see if you can stipulate and we will stand in recess until two o'clock.

Mr. Rhoads: I am awfully sorry but I couldn't get him here earlier.

Judge Biggs: That is all right.

(Recessed at 11:50 a. m. until 2 p. m.)

[fol. 248]

Afternoon Session

Present: Counsel as before noted.

Mr. Rhoads: If Your Honors please, may I suggest that we note the appearance of my partner, Mr. Robert T. McCracken, as counsel for the defendants in this case.

Judge Biggs: It is a pleasure to note your appearance, Mr. McCracken.

Mr. Rhoads: Dean Weigle, will you take the stand, please.

LUTHER ALLAN WEIGLE, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Rhoads:

Q. Dean Weigle, will you be good enough to keep your voice up so that Their Honors to your right as well as we out here may be able to hear you distinctly, sir.

Dean Weigle, where do you live, sir?

A. New Haven, Connecticut.

[fol. 249] Q. And what is your profession?

A. I am Dean Emeritus of the Yale University Divinity School.

Q. How long, sir, have you been Dean Emeritus of the Yale Divinity School?

A. Since 1949.

Q. Prior to that time what was your ~~status~~ or professional association with the Yale Divinity School?

A. I was Sterling Professor of Religious Education and Dean of the Divinity School.

Q. And from what period to what period, sir?

A. I was professor from 1916 to 1949, and Dean from 1928 to 1949.

Q. During those respective years were you also Sterling Professor of Religious Education, sir?

A. From 1924 on.

Q. On to 1949?

A. Yes.

Q. Dean Weigle, you were originally a resident of Pennsylvania, were you not?

A. Yes.

Q. Or a native Pennsylvanian.

Where were you born, sir?

A. Littlestown.

[fol. 250] Q. Now, would you be good enough to give us the benefit of a resume of your educational background, sir.

A. My elementary and secondary education was in the public schools of Altoona.

I graduated from the Gettysburg College in 1900; had two years in the Lutheran Theological Seminary at Gettysburg; three years, 1902 to 1905, in the Graduate School of Yale University.

Q. While in the Graduate School of Yale University did you receive any degrees, sir?

A. I received a Ph.D. degree in 1905.

Q. From the Yale Graduate School?

A. From the Yale Graduate School.

Q. Did you subsequently receive an LL.D.?

A. Yes.

Q. And from where?

A. Well, I will have to count up.

Q. Was it Gettysburg, sir?

A. Yes.

Q. And you received your M. A. degree from Gettysburg, I believe, in 1903?

A. Yes.

Q. Now, Dean Weigle, following your collegiate education did you specialize in any particular work professionally?

[fol. 251] A. In philosophy.

Q. Did you thereafter become associated with any institutions of learning prior to going to Yale?

A. From 1905 to 1916 I was Professor of Philosophy in Carlton College in Minnesota.

Q. From what time?

A. From 1905 to 1916.

Q. At the conclusion of 1916 where did you go?

A. I went to Yale in 1916.

Q. While you were at Carlton College, what did you teach?

A. Philosophy, psychology and education. We had settees in those days.

Q. Could you tell us, sir, what experience you had in the

field of education in Minnesota, outside of the teaching at Carlton College?

A. I was president of the Minnesota Educational Association in 1913.

Q. For one year?

A. Yes.

Q. What was the Minnesota Educational Association?

A. It is an association of teachers, both public schools and in the colleges, of Minnesota; a professional association such as you have in all states.

Q. Now, while at Carlton College you not only taught but [fol. 252] you also became Dean of that institution, did you not?

A. Yes.

Q. Did I get the years during which you were Dean of Carlton College?

A. 1910 to 1915.

Q. Dean Weigle, have you served on any special committees or church organizations which have been concerned with religious education?

A. Yes.

Q. Could you tell us what those associations were?

A. Well, beginning in 1914 I was on the International Sunday School Lesson Committee and was its chairman for part of the time.

I was the Chairman of the Educational Committee for the Federal Council of Churches in the late 1920's.

I was Chairman of the Administrative Committee of the Federal Council of Churches from 1928 to 1932.

I was President of the Federal Council of Churches, 1940 to 1942.

Q. Did you at any time, sir, become associated with a committee known as the American Standard Bible Committee?

A. I did.

[fol. 253] Q. Can you tell Their Honors first what was the nature of that committee and what was your association with reference to it?

A. In 1929 the International Council of Religious Education, which is a body that brought into association the



Educational Boards of some 44 Protestant denominations, acquired the copyright of what was known as the American Standard Version of the Bible, which was published in 1901. They secured the renewal of that copyright in 1929 and appointed a committee of scholars to have charge of the text.

That committee was organized definitely with 15 scholars as its members in 1930. I was made chairman of that committee at that time and have been its chairman ever since.

Q. And presently you are its chairman, is that correct, sir?

A. Yes.

Q. Now, you said it was composed of 15 scholars, including yourself, is that correct?

A. Yes.

Q. Could you name for the benefit of the record some of those scholars who were members of that committee of which you are chairman?

A. Dr. Henry Cadbury.

[fol. 254] Dr. James Moffatt.

Dr. Edgar J. Goodspeed.

Do you want more?

Q. Yes, if you could do so.

A. Dr. J. P. Smith.

Dr. F. C. Eiselen.

Dr. W. R. Taylor.

I am trying to think of those original men. Most of them have died.

Dr. Andrew Sledd.

Q. Well, now, Dean Weigle, you have given us the names of at least representative members of that committee. From the point of view of faith or faiths, what representation among the different faiths was there on that committee?

A. Dr. J. R. Sampay, whom I failed to remember a moment ago, was Southern Baptist.

So was Dr. A. R. Robertson Southern Baptist.

Dr. Edgar Goodspeed was Northern Baptist, as it was then called, American Baptist now.

Dr. Henry Cadbury was a Friend.

Dr. Eiselein and Dr. Shedd were Methodists.

I was Congregational.

Dr. Armstrong of Princeton, whom I failed to mention a moment ago, was Presbyterian.

[fol. 255] And so it goes down the line.

Q. Now, what was the purpose of the organization of that committee known as the American Standard Bible Committee?

A. Well, we were charged as our first duty to inquire as to whether or not the time had come to undertake another revision of the King James Version of the Bible. Such a revision had been made in the 1870's, which was published in Great Britain in 1881 and 1885.

The American Committee, which was associated with the British Committee, was given freedom to publish its edition after 14 years, and published its edition in 1901, which was known as the American Standard Version. That is the version which was placed in our hands as our charge to maintain the purity of its text. But we were told by the Council that we should investigate whether or not the time had come, in the light of new archeological discoveries, in the light of new linguistic evidence, whether or not the time had come to undertake a revision again.

We spent three years upon that problem of seeking to determine whether the time had come for another revision. At the end of that period we reported to the Council that in our judgment the time had come. The result was that in 1937, after a few years' delay due to the need to secure funds for the project, we were commissioned to undertake [fol. 256] the revision of the American Standard Version of the Bible in the light of modern scholarship as to the meaning of the Hebrew and Greek text.

We were also charged to maintain those qualities which have made the King James Version a matchless example of English literature.

Q. Did your Committee, Dean Weigle, proceed to carry out its commission?

A. We did.

Q. Now, will you tell Their Honors the method by which

the revision which was then contemplated was accomplished, the procedural methods adopted?

A. The Committee was divided into two sections, a New Testament section, which had to deal with the Greek text of the New Testament, and an Old Testament section, which had to deal with the Hebrew text of the Old Testament.

Our method was to assign Books to individual members of the Committee who would make what they regarded as the necessary revision. That draft was then circulated among the members of the Committee. When we met in face-to-face session, which we did for an average of four weeks out of each year for each section, we discussed those drafts verse by verse and word by word and reached our conclusions in that face-to-face conference.

[fol. 257] The draft that resulted from that process was mimeographed and it in turn was sent to all the members of the Committee and also to all the members of an advisory committee of some 50 or more members. The advisory committee was made up by our inviting each co-operating denomination to name scholars on whom it relied who would criticize these drafts for us.

On the basis of the returns that came from the individual members of the Committee and that came from the advisory committee, a written agenda was prepared of suggestions that were to be acted upon by the Committee itself. We then went over the entire Bible again in the light of this written agenda and the result of that finally was the finished product which was put in the hands of a small editorial committee to prepare for the printer.

Q. When finally was the Revised Standard Edition, which I take it was the product of your Committee's work, actually completed?

A. We completed the work on the New Testament in 1946. Or, rather, it was published in 1946. We had worked for nine years upon it.

The work on the Old Testament took longer, it took fifteen years and was published in 1952.

Q. And that is now known as what?

[fol. 258] A. The Revised Standard Version of the Bible.

Q. And that was the result of the efforts of some 15 scholars who composed the Committee, sir, as well as the cooperating efforts of other scholars to whom drafts and redrafts were submitted for purposes of criticism and modification, is that correct?

A. It was the efforts of the 32 scholars who finally composed the Committee, due to the fact that there were men who died and could not go on with the work. All in all there were 32 men who actively took part in the revision.

Q. Now, Dean Weigle, I understand, sir, that you yourself are familiar with Greek. Is that correct?

A. Yes. I trained to teach Greek in the first place and taught it for two years.

Q. Are you also familiar with Hebrew?

A. Yes.

Q. And have you personally engaged in the work of translations such as you have described as being done by this Committee?

A. I have. I was not simply the business head or administrator of this Committee. I was a member of the Committee with the same standing as any other, and I always voted when I put the question.

Q. Exactly. Thus differentiating you from the typical [fol. 259] chairman, is that correct, sir?

A. Yes.

Q. Now, were the other 32 scholars who composed the Committee scholars in the sense of the word that they were translators—

A. Yes.

Q. —and familiar with the original Greek and Hebrew?

A. Yes.

Q. Dr. Weigle, would you tell us what are the sources of the translation from which the Revised Standard Edition was made.

A. The base is the Masoretic Hebrew text of the Old Testament and the Greek text of the New Testament.

By Judge Kirkpatrick:

Q. What was the word you used, Doctor?

A. Masoretic. M-a-s-o-r-e-t-i-c; the Masoretic Hebrew.

text. That is a standardized Hebrew text which was standardized, oh, about the Sixth or Seventh Century.

Q. Was that a text that was translated from original Greek documents or—

A. No, no, that is the original Hebrew text.

Q. The original Hebrew text?

A. Perhaps I would have to distinguish a bit about this word "original." We do not possess the original documents [fol. 260] of any of these Hebrew books, the original manuscripts. We do not possess the original manuscripts of the Greek New Testament. What we possess are of course copies that have been made throughout the centuries.

Now, one of the outstanding reasons for undertaking revision of the King James Version is the fact that in the New Testament, for example, the King James Version was based upon the Greek text as edited by Erasmus in 1516, and Erasmus had only eight Greek manuscripts from which to edit that text. The oldest of his manuscripts was from the Tenth Century A. D. Because all of these manuscripts were medieval manuscripts they contained the accumulated deviations and possible errors of manuscript copying through 14 centuries. We now possess around 4,500 Greek manuscripts of the New Testament and about 200 of those manuscripts are really ancient in the sense that they come from the Third or Fourth or Fifth Century and are in the old uncial or capital text.

Now, the whole problem of textual scholarship is to determine as closely as we can what the original text of the New Testament was.

Q. How does that apply to the Old Testament, what you have said?

A. That applies to the Old Testament in this respect, [fol. 261] that before the Masoretic text was standardized, in say the Sixth Century, there had been the same sort of possible errors in manuscript copying in this Hebrew text that there had been before. Now, it chanced that the Latin Vulgate, which is a Latin translation of the Old Testament, and the Greek Septuagint, a Greek translation of the Old Testament, were made before this time of standardization, and so we will find that there are cases where

omissions have been made in the Masoretic Hebrew which we can supply now by turning back to the Vulgate and to the Greek Septuagint.

Q. That is very interesting, because I had heard in discussion that the Hebrew Old Testament was entirely derived from a Greek source. That is evidently not correct.

A. No.

Q. But you explained why it was. I can see how the idea arose.

A. Yes, sir.

Judge Kirkpatrick: All right.

Mr. Rhoads: Did Your Honors have any other questions?

Judge Biggs: No, no question.

By Mr. Rhoads:

Q. Now, Dean Weigte, when it came to the translation of the King James Version, or the revision of the King James [fol. 262] Version, which you have described, you went back in your Committee to the original text such as you have described to His Honor, Judge Kirkpatrick, and have brought forward in your testimony. Now, were those texts available to the scholars who prepared the Vulgate?

A. Presumably.

Q. Were they available to the scholars who prepared translations of the Bible prior to the King James Version in 1611?

A. Some of them.

Q. Could you inform us, simply so that we can get a complete record of what we are talking about, what was the cause or what precipitated the development of what is known colloquially as the King James Version of the Bible? I am speaking now of the Standard King James Version as distinct from the Revised.

A. Yes. The Roman Church—perhaps I shouldn't use that phrase for it. Say the Catholic Church. The Catholic Church of the Middle Ages had adopted the Latin Vulgate as its standard text of the Bible and if translations were made into the vernacular, those translations were made from the Latin Vulgate. One of the outstanding issues



of what we know as the Protestant Reformation was the feeling of Martin Luther and others, Calvin and others associated with them, that we must return to the original [fol. 263] Hebrew text; remembering always the qualification of the word "original" that I indicated; we must return to the Hebrew text of the Old Testament and to the Greek text of the New for our translations.

The first translation into English was made by William Tyndale, a translation of the New Testament made from the Greek.

Q. Made from the Greek?

A. From the Greek. And it was the first English translation to be printed.

Following that work of Tyndale, which was first published in 1525 and '26, there were a number of translations: Coverdale, a translation of the entire Bible; Matthew's Bible, which was in part Coverdale's work and in part Tyndale's work; the translation of the Bible by Richard Taverner; the Great Bible; which was published in the 1540's.

By Judge Biggs:

Q. Why was that called the Great Bible, Doctor?

A. Because of its size.

Q. Purely on account of its size?

A. Yes. It was an enormous volume. Their thought at that time was not to publish it for the possession of families or for individual readers. You may have heard how the Bible was chained to the lectern so that no one could get [fol. 264] away with it, but he would have had a pretty hard time because it was so big.

Following the Great Bible there came the Geneva Bible, which was a translation which was made by English refugees in Geneva and which struck a new line because it was a small volume and was intended for family use as well as for public use in the churches.

Following the Geneva Bible there came the so-called Bishops' Bible of 1568 and 1572.

In the meantime, the English Catholics on the Continent had prepared an English translation of the Bible which

they made from the Vulgate in place of from the Greek, and that was published in 1582.

Well, at a conference in Hampton Court in 1604, held by King James, a conference was convened in order to give to the Puritans on the one hand and the Anglican Catholic Party on the other hand, within the Church of England, a chance to compose their differences. In the course of that conference the proposal was made by one of the Puritan representatives that the time had come for another translation of the Bible, one that would be less sectarian than any that they had had up until that time, and King James was happy with that suggestion. He particularly animadverted with respect to the Geneva [fol. 265] Version, which he felt had too many sectarian elements to it, and as a result the commission was formed of scholars, British scholars of that day, taking in both parties. And they finally published the King James Version in 1611.

By Mr. Rhoads:

Q. Now, Dean Weigle, the several Bibles to which you have referred, the Geneva Bible, the Great Bible and the others which you have named, were all translations from certain original sources, were they not?

A. Yes.

Q. So that to that extent they had a common source with the King James Version as well as the Vulgate Version, is that correct?

A. Yes.

Q. When the Commission under King James between 1604 and 1611 set forth to make its translation, subsequently known as the King James Version, they, too, went to original sources, did they not?

A. They had the Masoretic Hebrew text and they had Beza's Revision of the Erasmus text, 1560.

By Judge Biggs:

Q. Pardon me. What was Beza's Revision?

A. It was simply a Greek text in which he profited from the possession of a few more manuscripts than Erasmus [fol. 266] had had.

Q. And published?

A. It was essentially Erasmus' texts. It was also published.

By Mr. Rhoads:

Q. Now, Dean Weigle, the work that resulted in the first King James Version was done by something in the nature of a commission, wasn't it?

A. Yes.

Q. Who composed that commission? Were they scholars?

A. Oh, yes, all of them.

Q. Scholars of their day?

A. All of them, yes.

Q. Was the attempt, so far as the translation via the King James commission, an attempt to apply the then-existing true scholarship to a translation of the Bible?

A. It was.

Q. Was it intended, so far as the translation was concerned, to be an objective approach to a subject of scholarship?

A. It was so intended, and it succeeded.

Q. Now, Dean Weigle, there are other versions of the Bible than the King James, are there not?

A. Yes.

[fol. 267] Q. Is one of them the Douay Version?

A. Yes.

Q. What is the Douay Version?

A. It is a translation that was made by British Catholic scholars on the Continent, a translation of the Old Testament which was made at much the same time as the Rheims New Testament a little bit later.

Q. As which New Testament?

A. As the Rheims New Testament.

Q. The Rheims New Testament, thank you.

A. (Continuing) But it was not published until 1609.

The interesting thing is that the Catholic Version of the New Testament which had been published in 1582 had a good deal of influence upon the King James Version of the New Testament, but the Douay Version, which was published only in 1609, did not have a similar influence upon the

King James Version of the Old Testament, for natural reasons.

Q. Has there been any further revision over the years of the Douay Version?

A. Oh, yes.

Q. And what is the name of that revision?

A. Well, the principal revision is the one by Challoner, which was made—I am sorry, I have forgotten just when it [fol. 268] was made, About 100 years, 150 years after the first publication in 1609.

Q. Has there been further work on the Douay Bible in recent years? I refer particularly to the Confraternity.

A. The Confraternity of Christian Doctrine is rather a new translation from the Vulgate than simply a revision of the Douay Version. Of course, your problem as to where you stop calling a revision a revision and when you begin to call it a new translation is a place that can't be exactly defined. But it surely should be said to the credit of the Confraternity of Christian Doctrine that they have faced the problem of making a translation of the Bible for our day with just the same objectivity, with just the same quality of linguistic skill and with just the same conscience in going back to the original texts that, well, that you would expect of good scholars.

Q. Now, with reference to what has been known as the Jewish Old Testament, what was the name of that text, sir, the current Jewish Bible?

A. I can't go farther back than the publication of the English Version by the Jewish Publications Society in this country.

Q. And that, I believe, sir, has been identified in this case as D-7, an exhibit in this case.

[fol. 269] I ask you whether that is the version or edition to which you have just referred.

A. That is, copyright 1917.

Q. By the Jewish Publications Society of America?

A. Yes.

Q. Now, Dean Weigle, all of these versions or translations of the Bible to which you have referred have, I believe, as their source certain original documents that are

available to scholars now and have been for centuries, is that correct?

A. Yes.

Q. Were those original documents, from which the translations were made into the Latin Vulgate in your opinion sectarian in character?

A. They were not.

Q. Were the original Hebrew or Greek manuscripts which are the source or basis of the Douay Version of the Bible, or the King James Version, as we now know it, in your opinion sectarian in character?

A. They are not, no.

Q. Does that apply also to the other series of Bibles or names of Bibles to which you have just referred earlier?

A. It does.

Q. Dean Weigle, what is your definition, if I may use that [fol. 270] expression, of the Holy Bible?

A. Well, the Holy Bible is the Hebrew Old Testament and the Greek New Testament together with its various translations into the different vernaculars.

Q. Will you state whether in your opinion the Douay Version that we have described and have been talking about is under the definition of the Holy Bible.

A. It is.

Q. Is the Jewish translation that you have just identified, D-7, within your definition of the Holy Bible?

A. It is.

By Judge Biggs:

Q. Does that contain the New Testament?

A. It does not.

By Judge Kirkpatrick:

Q. That doesn't quite coincide with your definition, then. As I understood you to say, the Holy Bible was composed of the Greek New Testament and the Hebrew Old Testament.

A. Yes.

Q. Now, if you cut out the Greek New Testament do you still have the Holy Bible?

A. You have the Holy Bible in that part of it that you retain.

Q. Yes, the part of it you retain, surely. I agree with [fol. 271] that, but I don't think it quite agrees with the definition that you gave.

Can you give us an idea of when the term "Holy Bible" first appeared, or how it came about, how long it has been in existence? Or is that something that there is no record or trace of?

A. Well, I am sure I could find a record of it if I could go to the library and look up these old Bibles. I could see when they first began using that title.

Judge Kirkpatrick: I was just wondering.

By Judge Biggs:

Q. Is not the Jewish Book which is in evidence, instead of being entitled "The Holy Bible," isn't it entitled "Holy Scriptures"? Is that not so?

Mr. Rhoads: Just a minute, Dean Weigle. I will get that. I think that is correct, sir.

(Exhibit D-7 was handed to the witness.)

A. "The Holy Scriptures According To The Masoretic Text."

Judge Biggs: Thank you.

A. (Continuing) Perhaps we can make that distinction. The Jews would use "The Holy Scriptures." We use "The Holy Bible."

[fol. 272] By Mr. Rhoads:

Q. Now, Dean Weigle, you are familiar, sir, with the—well, before I come to that question, Dean, have you had occasion to publish any books on the subject matter of the Bible?

A. Yes.

Q. Could you name one or two, if you will?

A. Well, I published a book entitled "The English New Testament From Tyndale To The Revised Standard Version" some years ago.



Q. As I simply have that in my hand, may I ask whether the document which I show you—

Mr. Sawyer: May I see it, Mr. Rhoads?

Mr. Rhoads: Yes, I am sorry.

Judge Biggs: Is this offered merely by way of qualification?

Mr. Rhoads: Yes, sir, that is all, sir, not for anything further than that. And of course I don't intend to offer the book, sir. I simply want to have it identified so that we may know the work.

Judge Biggs: Mr. Sawyer, would you concede that Dean Weigle was qualified as an expert?

Mr. Sawyer: Yes, indeed, sir.

Judge Biggs: Then I think we might omit further study [fol. 273] of this.

Mr. Rhoads: Certainly. I wouldn't press it for one moment, sir.

Judge Biggs: Mr. Sawyer agrees that he is qualified as an expert.

Mr. Rhoads: Oh, yes.

By Mr. Rhoads:

Q. Dean Weigle, from your knowledge of the sources and methods available to early scholars, do you believe that the King James Version, that is the Standard King James Version translation, is an accurate and scholarly piece of work?

A. It is, yes.

Q. Dean Weigle, coming to the issues in this case, there is a statute in Pennsylvania which provides—and I am merely summarizing it—that there shall be read in the public schools of this Commonwealth ten verses of the Holy Bible without comment at the opening of school.

May I ask you whether you have any opinion as to whether the reading of ten verses of the King James Version of the Bible without comment is sectarian in character.

Mr. Sawyer: I think that is objectionable, Your Honor. I think it comes close to—

Judge Biggs: Let him complete the question.

[fol. 274] Will you please not answer until the Court has had an opportunity to rule.

The Witness: Yes.

Judge Kirkpatrick: I think he did complete it.

Judge Biggs: Had you completed the question?

Mr. Rhoads: Yes, sir.

Judge Biggs: Pardon me. Would you read it again, please?

(The question was repeated by the reporter as follows:

"Q. Dean Weigle, coming to the issues in this case, there is a statute in Pennsylvania which provides—and I am merely summarizing it—that there shall be read in the public schools of this Commonwealth ten verses of the Holy Bible without comment at the opening of school.

"May I ask you whether you have any opinion as to whether the reading of ten verses of the King James Version of the Bible without comment is sectarian in character.")

Judge Biggs: The basis of your objection?

Mr. Sawyer: Well, Your Honor, there are two, really. In the first place, I don't know through this line of questioning what Mr. Rhoads or the witness means by "sectarian." I was going to ask about that in cross-examination, but it seems to me that this question usurps your function to some extent. You might as well ask him if it is constitutional.

Judge Biggs: We will overrule the objection and take the answer.

Would you answer the question, please, Dean Weigle.

A. In my opinion, because the Bible is not a sectarian book, that practice is not sectarian.

By Mr. Rhoads:

Q. Would that answer be the same, Dean Weigle, if there were a reading in the same manner as I have described from the Douay Version of the Bible?

A. The same.

Q. Would the same apply if the reading were from the Jewish Version of the Bible which you have identified a moment ago?

A. The same.

Q. Now, Dean Weigle, I come to the next question. In view of your long experience in the teaching profession, in educational activities and in religious endeavors involving also the translations of the Bible that you have just referred to in your testimony, will you tell us whether you have any opinion as to whether the kind of reading of the [fol. 276] King James Version of the Bible which I have just related to you a moment ago would, in your opinion, tend to the establishment of a religion.

Mr. Sawyer: Your Honor, I object to that. That is now asking him whether or not the practice—

Judge Biggs: We sustain the objection.

Mr. Rhoads: Would Your Honor hear me on that?

Judge Biggs: Yes.

Mr. Rhoads: It seems to me, sirs, that the issue here is a twofold issue, the sectarian character as well as whether the act itself is something which under the Constitution, because it is part of the issue in this case, is a practice which would tend toward the establishment of a religion, because I understand that that is part of the case.

Judge Biggs: It most certainly is, but is not that an inference or a conclusion to be drawn by the Court?

Mr. Rhoads: If Your Honors please, unquestionably the ultimate conclusion is Your Honors', and not for one moment would I suggest that this question were to be in substitution for Your Honors' opinion. But it seems to me that it is one of those issues on which we produce here a scholar who has devoted a great part of a long life to [fol. 277] this question, the very question whether the thing that is involved here in this case is sectarian, is of a character which would be violative of the Constitution.

Now, it would seem to me—

Judge Biggs: That is a question of constitutional law.

Judge Kirkpatrick: Yes. Suppose you produced a constitutional lawyer for his opinion on that matter. That certainly wouldn't be relevant. This gentleman has very full knowledge of one phase of the thing but has he any more knowledge than any person who has studied constitutional law? And assume that the Judges have at least a smattering of constitutional law.

Mr. Rhoads: Well, it would seem to me, sir, that the issue is a little different where we were suggesting that Your Honors should be advised on constitutional law by a lawyer. I think that would be clearly a trespassing upon the ultimate function of the Court. But I am thinking here—and I must say I am thinking aloud with Your Honors, very frankly—it occurs to me that this is in a possibly rarefied atmosphere of expert testimony. Now, if Your Honors feel that I am going beyond my limits in this offer I certainly do not—

Judge Biggs: Mr. Rhoads, after all, you have qualified the doctor as an expert on the subject of religious education, religious lore and religious background, but you haven't qualified him as a constitutional lawyer. Even if you had I would still think that would remain the prerogative of the Court.

Mr. Rhoads: Well, I frankly suggest, sir, that I haven't attempted to qualify him as a constitutional lawyer, and had I done so I would not have asked the question under the circumstances.

Judge Biggs: He is probably a much better constitutional lawyer than the present speaker, but nonetheless that function is confided to us.

Mr. Rhoads: Would Your Honor be good enough to note an exception.

Judge Biggs: You don't need an exception because we will note you one anyway.

By Judge Kirkpatrick:

Q. May I ask a question. Do you think that if a teacher by chance happened to be a person of the Jewish faith and he eliminated the King James Version entirely from the school, didn't permit anybody to read anything from the King James Version and only allowed readings from the Scriptures, the Hebrew Scriptures, in English, of course, do you think that he would be conducting exercises which involved the reading of verses from the Holy Bible?  
[fol. 279] A. He would certainly be conducting exercises which would involve the reading of the Holy Scriptures, as he understands the Holy Scriptures.

Q. But the trouble is the law says the Holy Bible is what must be read.

A. Yes. His practice would be a sectarian practice.

By Mr. Rhoads:

Q. If he permitted nothing else, you mean.

A. Yes, if he permitted nothing else.

Judge Kirkpatrick: Yes, that is what I inquired.

Mr. Rhoads: Is that all, sir?

Judge Biggs: Yes, will you proceed.

Mr. Rhoads: Thank you.

By Mr. Rhoads:

Q. Now, Dean Weigle, based upon your experience as an educator, have you formed any opinion as to whether from the educational standpoint the reading of ten verses of the Holy Bible as described in this case—and by "The Holy Bible" for the minute I will refer to the King James Standard Version—do you believe that that possesses any educational value?

A. I do.

Q. What kind of educational value do you think it possesses, sir?

Mr. Sawyer: Your Honors, I didn't object to the question because it seemed to me it makes very little difference, but I think if we are going to develop this at length then I would object on the ground of whether it possesses educational value or not is quite irrelevant. This might be agreed by every possible educational authority to be the best pedagogy possible. If the Constitution bars it it couldn't be read, and I think that we can waste a lot of time if we develop the ideas of what value this might have educationally.

Judge Biggs: We will overrule the objection.

By Mr. Rhoads:

Q. Dean Weigle, will you answer the question, sir.

Would you like it re-read?

A. If you please.

(The question was repeated by the reporter as follows:

"Q. What kind of educational value do you think it possesses, sir?")

A. It possesses a moral educational value because, after all, the Bible is the record of the experience of the people that discovered what God really is like, and has given us the Ten Commandments and other moral precepts which are [fol. 281] contained in the Holy Bible.

It is of very high literary value because the King James Bible is what one authority has called the noblest monument of English prose. It has contributed to the making of the English language as no other English book has done.

It is of great value, it seems to me, to the perpetuation of those institutions and those practices which we ideally think of as the American way of life, because the Bible has entered vitally into the stream of American life.

I won't stop to say anything more than that Lincoln was an assiduous student of the Bible; that much that Lincoln did and much that Lincoln wrote bears the stamp of his understanding of the Bible upon it.

We have recently had a book by a man who has investigated the early fathers, in which he finds that among all of them, Franklin, Washington, Jefferson, Madison, John Adams, though they were men that were far from the strictest orthodoxy or far from being adherents to everything for which institutional religion stands, they had this supreme reverence for the Bible.

Those are my reasons, sir.

By Mr. Rhoads:

Q. And that is a summary of your reasons in answer to my recent questions, is that correct, Doctor?  
[fol. 282] A. Yes.

By Judge Kirkpatrick:

Q. That is the book entitled "In God We Trust"?

A. Yes, by Norman Cousins.



By Mr. Rhoads:

Q. Dean Weigle, there is one phase of the case which I have neglected to advert to in my questioning. There is also the practice in Abington School District of reciting the Lord's Prayer at the same opening exercises. Have you any observations as to that practice, sir?

A. It seems to me to be an entirely seemly and proper practice. After all, it is very much like the opening of legislative assemblies with prayer.

I see nothing in the Lord's Prayer that is sectarian. Everything in that prayer can be paralleled in Jewish literature, in the Holy Scriptures of the Jewish people.

Q. Doctor, I have been looking over some notes here and in referring to your background I do not believe that I asked you whether you had been ordained as a minister.

A. I was ordained as a Lutheran minister in 1903.

Q. Did you ever have any pastoral assignment?

A. Yes. I was for four months in 1903 the first pastor of a newly gathered congregation at Mount Union in Penn-  
[fol. 283] sylvania. And I was for one year pastor of a Lutheran church in Bridgeport, Connecticut.

Q. Is that the sum of your pastoral experience?

A. That is the sum of my pastoral duties.

Q. And the rest of your very busy life has been—

A. In colleges and universities.

Q. —involved as you have just told us?

A. Yes.

Q. Dean Weigle, we all want to thank you very much for your having come.

A. You are welcome.

Mr. Rhoads: Now you may cross-examine, Mr. Sawyer.

Judge Biggs: I think we better take a brief recess, six or seven or eight minutes. We will then resume.

(Recess, 2:00 o'clock P. M. until 3:10 o'clock P. M.)

Cross examination.

By Mr. Sawyer:

Q. Dean, the New Revised Standard Version of which you spoke in the early part of your testimony was greeted with some controversy in the Protestant world, is that correct?

[Vol. 284]. A. I can't quite hear you. Will you speak a little louder, sir?

Q. Yes, indeed, sir.

Was that version greeted with some controversy in the Protestant world when it was published?

A. No, it wasn't greeted with any controversy in the Protestant world. It received some controversy from certain fringes, but—

Q. What were those fringes?

A. —it has been—

Mr. Rhoads: Just wait. Let him answer, please.

A. It has been welcomed very heartily in the Protestant world.

By Mr. Sawyer:

Q. What were the fringes that you speak of that took exception to the New Revised Version?

A. Well, people who thought that there ought be no revision.

By Judge Kirkpatrick:

Q. Wasn't a good deal of that feeling sentimental, you might say?

A. I think so.

[Vol. 285]

By Mr. Sawyer:

Q. Are you familiar with an organization known as the International Council of Christian Churches?

A. I have heard of it, sir. I am not familiar with it.

Q. And you have heard of a Mr. Carl McIntyre, who is the founder and president?

A. I have heard of him. I don't know him.

Q: Did he take up a crusade, so to speak, against the New Revised Standard Version?

A: Yes, but of course he has taken up a great many crusades, including one against the Presbyterian Church.

Q: People feel strongly about these matters, don't they, translations of the Bible? Don't they, Doctor?

Mr. Rhoads: Objected to, sir.

Judge Biggs: I think that is proper cross-examination.

Mr. Rhoads: Withdrawn.

A: Of course people feel strongly. After all, one of the things that has happened in the years has been that the publishers of the King James Version have failed to keep alive the very remarkable preface to the King James Version entitled "The Translators to the Reader," in which—

By Mr. Sawyer:

Q: I will come to that, Doctor. I don't mean to cut you [fol. 286] off, but I believe you did answer my question, which was whether or not they felt strongly.

A: I am just telling you that they felt very strongly, and I am going to tell you how that happened back in the days of the King James Version.

Q: Well, if you will permit me, sir, I will continue with my line of questioning. Then I am sure Mr. Rhoads will take you over that if he cares to.

A: All right.

Judge Biggs: Yes, I am sure we will get along better.

By Mr. Sawyer:

Q: Now, did there come a time, sir, if you know, when there was a burning of the Revised Standard Version a few weeks after it was published in December of 1952, down in North Carolina? Do you remember that incident?

A: Yes.

Q: Do you recall that one of the things that was attacked was the fact that in I believe it is Isaiah 7:14 the New Revised Standard substitutes the word "woman" for the word "virgin" in speaking of the prophecy of Isaiah which the

Christian Church has widely acclaimed and heralded in the coming of Christ? Is that an incident which is familiar to you, sir?

[fol. 287] A. Yes.

Q. Was it familiar to you that a Rev. Martin Luther Hlicks, or Hucks, I believe it is—does that gentleman's name mean anything to you, sir?

A. It doesn't register.

Q. It does not.

A. But what is this leading to?

Judge Biggs: The "Martin Luther" registers, doesn't it, Doctor?

The Witness: The "Martin Luther" registers, but what was this leading to?

By Mr. Sawyer:

Q. And you recall that the Gallup Poll was taken on the preferences of people as to the New Revised Standard Version or the King James Version?

A. May I ask why you are getting this chapter into the record, without asking me any questions about it?

Judge Biggs: Dean, we have a method of procedure here with which you are familiar. One of them is that—

The Witness: That I don't ask any questions.

Judge Biggs: —counsel ask the questions and you make the answers.

The Witness: Right.

[fol. 288]

By Mr. Sawyer:

Q. I was wondering if you knew that there had been a Gallup Poll.

A. What?

Q. If you knew there had been a Gallup Poll taken as to whether people were in favor or against the revision of the King James Version known as the New Standard Revised Version. Did you know that a Gallup Poll had been taken?

A. No.

Q. Now, I wonder, sir, if you could define for us what you mean when you say "sectarian."

A. A movement is sectarian when it is meant to establish the distinctive doctrines of some particular sect as opposed to the doctrines of other sects.

Q. And when would a Bible be sectarian?

A. When it was so translated as to do just that, that is,—

Q. And would you say, sir,—

Mr. Rhoads: Wait a minute. Do you have anything further?

A. (Continuing) That is, to tend to establish the distinctive doctrine of that particular sect as opposed to other sects.

By Mr. Sawyer:

Q. Would you say, sir, that in the translation of Isaiah 7:14 that there is no-sectarian aspect as to whether or not [Vol. 289] one believes that the word of God there set forth is that a young virgin shall conceive or a young woman shall conceive? Is that a sectarian issue?

A. That is not a sectarian issue.

May I ask a bit of liberty to speak to that, sir?

Judge Biggs: Yes, you may.

A. (Continuing) The doctrine of the virgin birth, so far as the Scriptures, so far as the Holy Bible is concerned, rests upon various direct statements which are made in the New Testament, in Matthew and in Luke. It does not depend upon the translation of that particular text in Isaiah.

The Bible itself, of course, at that point is the Hebrew. A translation is just a translation. It chanced that the Septuagint used there as translation for the Hebrew word "almah," which means young woman—

By Judge Kirkpatrick:

Q. How do you spell that, please?

A. A-l-m-a-h. The Hebrew has a-l-m-a-h, which means young woman. It chanced that the Septuagint used at that place the Greek word "parthenos." The usual meaning of parthenos is virgin, but the Greek Septuagint is very loose

in its use of the word "parthenos." For example, it calls Dinah a parthenos after Shechem had raped her.

[fol. 290:] The translation of this word by scholars generally is young woman. It has been so accepted by all of the basic Hebrew dictionaries. It has been accepted by Fundamentalist scholars who may have objected to other points of the Revised Standard Version but do not object to this. It has been accepted by churches that, well, you wouldn't expect to accept it.

By Mr. Sawyer:

Q. Has it been rejected by others?

A. I don't know anyone that has rejected it that understands the Hebrew.

Q. I am not asking you whether they are wrong or right in their rejections, as your answer was, sir, but do you know that there are bodies of opinion within the Protestant world and outside of it which specifically rejected this translation?

A. Oh, yes.

Judge Biggs: I didn't get the answer. What was the answer, Doctor?

The Witness: Yes, there are some.

Mr. Rhoads: Are we now speaking; so that the record may be clear, of the Revised Standard Version published in 1946 and 1952? Is that correct, Mr. Sawyer?

Mr. Sawyer: Yes.

[fol. 291] Judge Kirkpatrick: No, he is only speaking of one passage.

Mr. Sawyer: One passage.

Mr. Rhoads: Oh, yes. I meant of the Revised, and I meant that passage.

Judge Biggs: This passage of the Revised Standard is what the record shows.

Mr. Rhoads: Yes, sir.

By Mr. Sawyer:

Q. Have the Catholics rejected it?

A. What is that?

Q. Have the Catholics rejected it?



A. Well, I know of no Catholics that have rejected this translation of Isaiah.

Q. Do you know of any who have accepted it?

A. I know of Catholic scholars to have accepted it, yes.

Q. Do you know of any acceptance of it by the Catholic Church?

A. The Catholic Church has not passed on the subject, as far as I know. You see, the Catholic Church has a recourse that Protestants generally do not have. They can translate what the Scriptures say and then they can put in a note what the authorized theology of the Church is with respect to that particular point.

[fol. 292] Q. Do you know whether or not the Catholics regard those notes as essential to a proper reading and understanding of the Bible?

A. I just don't know. I am not a Catholic.

Q. You don't know that?

A. I am not a Catholic.

Q. Doctor, would you say that the Holy Bible—and I am using those particular words—the Holy Bible would be complete without the New Testament?

A. No.

Q. You defined, I believe, a sectarian Bible as one in which the message of a particular sect were conveyed by that version of the Bible. On that definition, Doctor, would you say that the New Testament was sectarian in that it conveys the message of a particular sect?

A. It conveys the message of Christians.

Q. Yes, as opposed to non-Christian sects?

A. Yes.

Q. When you said "non-sectarian," did you mean as among the various Protestant sects?

A. I meant among the various Christian bodies.

Q. Now, turning to the King James Version, were there any Jews on the scholarly committee that the King appointed to make that translation?

[fol. 293] A. The King James Version?

Q. Yes.

A. No.

Q. Were there any Catholics?

A. Well, certainly a good many of them would have called themselves Catholics, yes.

Q. But did they mean Roman Catholics?

A. No, they were not Roman Catholics.

Q. They meant Anglican Catholics.

Were there any Nonconformists, as they were referred to in those days?

A. They were Puritans.

Q. Would you call them Nonconformists?

A. It is a little—

Q. Were the sects generally known as Nonconformists at that time included among the scholars who translated the King James Version?

A. I don't think there were any Separatists.

By Judge Kirkpatrick:

Q. Any Presbyterians?

A. There were men certainly of Presbyterian conviction, but whether they were Presbyterians or not I don't know.

By Mr. Sawyer:

Q. You say in your book, Doctor, which was referred to, [fol. 294] that there were no Nonconformists on that committee. Would you think that is a fair statement as made in your book?

A. I think so, yes.

Q. Are you familiar with the dedicatory epistle of the King James Version?

A. Yes.

Q. Would you say that that epistle is sectarian in its nature?

A. Not that I remember.

If you have some specific item in mind, ask me about it.

Q. Well, I was referring to a portion, and I will read:

"... so that if, on the one side, we shall be traduced by Popish Persons at home or abroad, who therefore will malign us, because we are poor instruments to make God's Holy Truth to be yet more and more known unto the people, whom they desire still to keep in ignorance and darkness; . . ."

Would you think that statement had a sectarian aspect to it, sir?

A. It sounds a little that way, but that is not part of the Bible.

Q. Well, we are speaking now of the aegis under which this Bible came into being rather than the text.

[fol. 295] A. Well, of course it did not come under the aegis of the Roman Church.

Q. Would you think of the Bible as primarily the word of God or as primarily the literary and historical work about which you spoke on direct examination?

A. What are you asking me about now, my personal beliefs or—

Q. Well, Doctor, on what basis did you testify?

Mr. Rhoads: Objected to, sir. It is perfectly clear from the record the basis on which he testified.

Judge Biggs: We sustain the objection.

I think you can ask him the basis upon which he reached his expert conclusions but I do not think that his own faith or his own belief is pertinent.

Mr. Sawyer: I didn't ask him what it was, Your Honor. I wouldn't think of doing that. He asked me whether I was asking him that and I rejoined in the only way I knew, which was to ask him how he had testified in the first place, because I wished him to answer on cross from the same basis of knowledge on which he answered on direct.

Judge Biggs: Mr. Sawyer, there is no use in raising a point here which is undesirable. I felt that you were raising that point; however unconsciously you may have done so. [fol. 296] Mr. Sawyer: Should I say this to the witness then, sir:

My intention, Doctor, was to assume that you would testify on these questions of doctrine and theology and the like on the same basis now as you did on direct examination. You are qualified as an expert and therefore I assumed you would draw on that same expert knowledge.

A. (Witness nods head.)

Judge Biggs: The answer is "yes."

The reporter has to have an answer on the record.

A. Yes, the answer is "yes."

By Mr. Sawyer:

Q. Is the answer "yes" to my substantive question about the gravamen of the Bible?

Mr. Rhoads: If Your Honors please, may I suggest that the examination is somewhat argumentative and that if Mr. Sawyer would recast and restart his question it might be a little more helpful to all of us.

Mr. Sawyer: I shall do that, sir. I think we may have the dean a little at a loss.

Judge Biggs: I think your question is a little bit truncated in that respect.

[fol. 297] Mr. Sawyer: Yes, ~~we~~ are lost now.

By Mr. Sawyer:

Q. I will put the question this way, Doctor: In your opinion as an expert is the King James Version of the Bible to be regarded primarily as an historic record, as a piece of English literature or as the revelatory word of God?

A. Again you are asking me, sir, about my belief. I have stated that I think that this is a justified practice of educational value from the standpoint of morals, from the standpoint of literature, from the standpoint of the place that the Bible has occupied and continues to occupy in American life. Now, over and above that what I believe does not seem to me to be relevant to this inquiry.

Q. Doctor, maybe I can approach it this way. I would like to read you a paragraph from your book, sir, entitled "The English New Testament" which was referred to by Mr. Rhoads. The paragraph says:

"The message of the Bible is the central thing, its style is but an instrument for conveying the message. The Bible is not a mere historical document to be preserved. And it is more than a classic of English literature to be cherished and admired. The Bible contains the Word of God to man. And men need the Word of God in our time and hereafter [fol. 298] as never before."

Now, would that fairly express your feeling as to the respective proportion and importance of the three factors, historical, literary and religious, shall I say, embodied in the work that we think of as the Bible?

Mr. Rhoads: Now, if Your Honors please, I object to that phase of the question, whether it is by virtue of reference to a book written by the witness or otherwise. That phase of the question must of necessity involve the witness' statement of his own faith.

Judge Kirkpatrick: But how can he object when he has published the statement in this book?

Mr. Rhoads: I don't think he could object, sir, and I don't think he would object, but I am still saying that it seems to me that anything that is directed toward this man's faith is completely outside of this case.

Judge Biggs: We are not trying the issue of the dean's faith or anything in connection therewith, but it does seem to me that when you put your question what should be the respective values to be given to the factors to which the doctor has testified, you are entitled to an answer. Whether that necessarily includes some portion of his own mind, which of course must include some standard of belief or lack of it, I think he is entitled to the answer.

[fol. 299] Mr. Rhoads: With that suggestion by Your Honor I certainly have no objection to the question being asked or answered.

• Would you repeat the question?

Mr. Sawyer: I will ask the stenographer to do so, sir.

(The question was repeated by the reporter as follows:

"Q. Doctor, maybe I can approach it this way. I would like to read you a paragraph from your book, sir, entitled 'The English New Testament' which was referred to by Mr. Rhoads. The paragraph says:

"The message of the Bible is the central thing, its style is but an instrument for conveying the message. The Bible is not a mere historical document to be preserved. And it is more than a corner of English literature to be cherished and admired. The Bible contains the Word of God to man. And men need the Word of God in our time and hereafter as never before."

"Now, would that fairly express your feeling as to the respective proportion and importance of the three factors, historical, literary and religious, shall I say, embodied in [fol. 300] the work that we think of as the Bible?")

Judge Biggs: Would you answer it first, Dean, whether yes or no. Does it?

A. It does.

Judge Biggs: Then you may give such explanation as you wish.

It does?

A. Yes, I stand on what I said there. The point, however, is this. I stressed the moral value and the literary value and the historical value of the Bible as pertinent to the case that is before us. Now, the actual fact is that the Bible has those values because people have believed it, because they believe that there is something revelatory in it of what true morals are. It is not simply a literary exercise but its literature has arisen out of that faith.

Now, I am perfectly willing to grant that. I still would say that the reasons why it may have a place in our educational system are these three reasons that I gave.

By Mr. Sawyer:

Q. Doctor, isn't it true that there has even been controversy as to the Lord's Prayer, as to whether the pronoun in the opening phrase should be "which" or "who"? [fol. 301] A. Well, I don't know about that.

Q. Haven't you ever known of that controversy between those who say it should be "Our Father which art in heaven" and those who say it should be "Our Father who art in heaven"?

A. I have never heard of that. Let's have it.

Q. Well, I just wondered, Doctor, because on page 127 of your book you recount an incident in which someone invited your attention to—well, I will read it to you, sir.

A. Sure.

Q. "Much of what is said as to the value of the King James Version for use in worship is without any sound basis. One man argued that we should always say, 'Our



Father which art in heaven' because the word 'which' removes God from the company of men, and sets him apart as unique and transcendent. The King James translators would have laughed at such an interpretation; for them the relative pronoun 'which' has the meaning that the relative pronoun 'who' now has."

So isn't that an example, Doctor, of where a word may make a difference, as to whether or not you are a Transcendentalist or whether or not the God which you imagine is anthropomorphic?

A. Oh, no; oh, no. After all, when the King James Version [fol. 302] our people said, "Our Father which art in heaven" they meant exactly the same thing that we mean by "Our Father who art in heaven." There certainly is no controversy on that point.

This particular man to whom I referred is an eccentric in his feeling that "which" makes God transcendent.

Q. He is at least one, is he not, Doctor?

A. Yes, I had that controversy with him.

Q. It did make a difference to him, didn't it?

A. Perhaps.

Q. Now, again as to the content of the Bible, are there not books in the Old Testament which are included in the Catholic Bible which are not included in the King James and the Jewish Versions?

A. The King James contains the—you are referring to the books called the Apocrypha, I suppose?

Q. Yes. What are those books, Doctor?

A. First and Second Esdras, First and Second Maccabees, Judith, Tobit, the Wisdom of Solomon, the Wisdom of Sirach, usually called the Ecclesiasticus, the History of Susannah, Judith,—I am not sure I have given them all, but—

Q. Would Baruch be one?

A. Baruch, yes, the Epistle of Baruch.

They are in the King James Version and they have now [fol. 303] also been translated for the Revised Standard Version. We spent five years on that.

Q. Are they in the Jewish, the book known as the Holy Scriptures?

A. No.

Q. Do you know whether or not what the Jewish view is with regard to those books known as the Apocrypha?

A. I know only that they are not included in the Hebrew Canon of Holy Scripture.

Q. If you will excuse me just a minute, I want to look at your King James compared with mine.

Mr. Rhoads: There are a couple of them there, I think.

Mr. Sawyer: I will look at D-2.

By Mr. Sawyer:

Q. I know you are right and any lawyer that would presume to cross-examine you on the content of this is only asking for trouble, but I was surprised, sir, at your answer. My King James Version I thought had not contained those books that you mentioned. Probably they are indexed there under a general title that I can't fathom, but I don't see them in that one, either. I wonder if you could clear that up for us. I mean Maccabees One and Two, Tobit, Judith, Baruch and those books.

[fol. 304] A. Yes. These books are included in the Latin Vulgate. They are not included in the Hebrew Holy Scriptures. Because they were included in the Latin Vulgate they were translated as a part of the Bible by the Roman Catholics. The Protestants took various views with respect to them. Martin Luther translated them in his German Bible but instead of including them in either the Old Testament or the New Testament he put them between the Testaments with a notation to the effect that, "These are books that are useful," or something like that.

They were included in most of the translations that were made in England in the Sixteenth Century and they were included in the King James Version of 1611, and included for many years thereafter. But gradually publishers just began dropping them out, and that is what has happened.

There was controversy in the British and Foreign Bible Society and other places about it, but that is what has happened, that most Bibles that have been published in the Nineteenth Century and after just don't include them.

Q. So that they are not to be found, then, in the average—

A. In current King James Versions, no, they wouldn't be found. But they belong to the King James Version as was [fol. 305] published originally.

Q. I might ask you, sir, were there any Normans on the Committee for the New Revised Standard Version?

A. No.

Q. Do you know, sir, whether or not the Normans regard certain other books as being part of the Bible and actually the word of God, books not included in our King James Version?

A. I don't know.

Q. You do not know whether that is true?

A. I don't know.

Q. Dean, have you heard of the Book of Normans, sir?

A. I have a copy.

Q. But you do not know as to the status with which the Norman Church regards that book? Is that your answer?

A. Yes.

By Judge Kirkpatrick:

Q. Does the Norman Church regard itself as a Christian church?

A. I think so, though you are asking me something on which I don't have great knowledge.

Q. The Christian Church does not regard the Norman Church as having Christian faith, or is that also an open question?

A. I guess that is an open question, Your Honor.

Mr. Sawyer: Are you finished, Your Honor?

[fol. 306] Judge Biggs: Yes.

By Mr. Sawyer:

Q. Doctor, you testified I think it was at the end that you yourself were and are, I take it, an ordained Lutheran minister.

A. I was ordained in the General Synod of the Lutheran Church and maintained my ministry in that church until 1916. When I went to Yale I became a Congregationalist. I was dismissed—well, now, wait a minute, I don't mean to say that they dismissed me.

Q. I understand, sir.

A. I asked that they give me a letter of dismissal to the Congregational Association because it seemed best for me to maintain that affiliation as I took up this new work at Yale.

Q. Your actual theological training had been as a Lutheran?

A. Yes, and I am still a Lutheran in theology, Congregationally affiliated.

Q. I see, sir.

A. And are you familiar with the work known as The United Testimony on Faith and Life, reported at the Joint Union Committee to the Five Churches of the American Lutheran Conference, 1952?

A. No, I am not.

Q. You are not familiar with that, sir?

[fol. 307] A. No, I am not.

Q. I think I know your answer on this but I just wondered by any chance are you familiar, Doctor, with a study done by the Philadelphia Council of Churches called "Religion in Public Education"? This was done two years ago.

A. No, I am not.

Q. I thought you might possibly have known about it.

A. No. I have given myself so completely to the Revised Standard Version work in recent years that I haven't kept up on many things.

Q. I think that is all, Doctor.

Oh, you mentioned Lincoln and his reading of the Bible. I take it, Doctor, that to your knowledge he read it himself and he didn't have it read to him in school? Would that be correct?

A. Well, I don't know whether he had it read to him in school or not. In fact, I don't know how much schooling he had.

Q. Whether he went to school, yes, sir.

Thank you, that is all I have.

# Redirect examination.

By Mr. Rhoads:

Q. Doctor, may I just ask you one final question. You have spoken about the certain values in the reading of the [fol. 308] Bible. Do you believe that the reading of the Bible is inspirational in character just as the reading of fine poetry would be inspirational in character?

Mr. Sawyer: I object to that, Your Honor. I don't know what "inspirational" means and I am not sure that we could define it if we stayed here all afternoon.

Judge Biggs: I think that is a point which might well be argued to the Court, Mr. Rhoads. I will sustain the objection.

Mr. Rhoads: I withdraw the question.

By Judge Biggs:

Q. Doctor, just as a matter of information for me personally, so to speak, I really probably shouldn't ask this question—but as I understand it, at the time of the King James Version and the appointment of the Committee, the persons who comprised that Committee were of the view that they were all Conformists, that they themselves were Conformists and that the Nonconformists were the group which had in effect caused a schism. Is that correct?

A. I think that is correct, sir.

Q. They considered themselves the orthodox group, the Conformists.

A. Yes. You have to realize, of course, that the Puritans were themselves a party within the Church of England and [fol. 309] were therefore Conformists. The more extreme Puritans felt that they had to break out, and they became Separatists.

Now, if we take the group that came here to America, the Pilgrims who came to Plymouth were Separatists, but the Puritans who came to Massachusetts Bay were conforming Puritans, that is, they did not separate from the Church of England.

Judge Biggs: Thank you. That has nothing to do with the case. I regret that I indulged my curiosity to that extent.

Anything else of the dean?

Mr. Rhoads: Nothing further, thank you.

Judge Biggs: Dean, thank you so much. It was a pleasure having you.

(Witness excused.)

Mr. Rhoads: If Your Honors please, Mr. Sawyer and I have solved I think one question which was raised just before adjournment, having to do with Dr. Boehm. I feel that neither of us should be in the position of stipulating on Dr. Boehm's testimony, and I have told Mr. Sawyer why. He agrees with me. We have therefore agreed among ourselves, subject to Your Honors' approval, that we would [fol. 310] relieve Your Honors of listening to his testimony; that we would take his deposition tomorrow morning and that we would agree that it might become a part of the record with the same force as if he had been here in person testifying, preserving to Mr. Sawyer all rights that he would have with reference to any testimony which I might have adduced from the witness.

Is that correct?

Mr. Sawyer: That is correct, sir.

Judge Biggs: It is so ordered.

Mr. Rhoads: Thank you, sir.

Judge Kraft: It would occur to me, however, one situation that should be regarded with respect to the depositions. So frequently it is the practice of counsel to reserve all objections to the trial. Since it is your apparent intention to submit this deposition as if the witness testified here, if there is any matter of substance to which objection is desired to be made and pressed at the time of argument, it is my view that that objection ought to appear clearly upon the record. We can then, if it is a matter of importance, rule on it before disposition and after argument. But if, as is the custom, it is reserved, it will be of no help to us.

Mr. Rhoads: I rather intended, sir, the former, Judge [fol. 311] Kraft, namely, that Mr. Sawyer would spread



in detail on the record of the deposition his objection and that unless such objection were so spread it would be considered as unobjectionable; unlike the usual deposition.

Judge Biggs: I think that would be the most precise way to do it. We will then have a very clear record of the objection.

Mr. Sawyer: I agree, sir, and of course I am mindful in making this arrangement that this gentleman is the State Superintendent of Public Instruction, he isn't called as an expert in theology or the like.

Mr. Rhoads: That is quite right.

Mr. Sawyer: You said he would be about ten or fifteen minutes, so that I anticipate that objections may very likely not arise out of that kind of testimony any more than it did this morning out of the school people.

Mr. Rhoads: I wouldn't think so.

Judge Biggs: Of course. Any objection which is so recorded at argument will be argued, and if the Court deems it to be irrelevant we will strike it.

Mr. Rhoads: Exactly, sir.

With Your Honors' permission, I just have two or three more matters.

Judge Biggs: Yes, certainly.

[fol. 312] Mr. Rhoads: In order to complete the record, sir, I would like to offer in evidence as Defendant's Exhibit No. 9 a portion of the report of Nathan C. Schaffer, Superintendent of Public Instruction of Pennsylvania during the year 1913, which was shortly after the passage of the Act involved in this case, in which is contained reference to the then superintendent's thinking with reference to the practice and what should be done under the then Act of Assembly which has been carried out.

I do not have the original, I can't find it. It seems to have departed from the Superintendent's office. But I have copied from the brief of the Attorney General of Pennsylvania by Mr. Stambaugh as amicus curiae in the Doremis case, with which Your Honors are familiar, and the excerpt that I am quoting is contained upon page 3 of Mr. Stambaugh's brief as amicus curiae in that case. We will endeavor to find an original if we can, but I have spoken to Mrs. Forer about it and I am sure that Mrs. Forer

agrees that if it were in Mr. Stambaugh's brief it is a proper excerpt.

Judge Biggs: Has Mr. Sawyer seen this.

Mr. Sawyer: I haven't seen it.

Mr. Rhoads: I don't think he has.

(The document was handed to Mr. Sawyer.)

Judge Biggs: Well, of course, if Mr. Sawyer will agree [fol. 313] I would doubt the necessity of going to the trouble of producing the original.

Mr. Sawyer: Well, I object to it being in the record, Your Honor. If Mr. Rhoads wants to put this in his brief or put it in a footnote I would be the last to come in and say he has adverted to something that isn't in the record. I think it is a matter of argument but I don't think it adds anything to the record as such.

Judge Biggs: May I see it?

Mr. Rhoads: Yes, sir.

Mr. Sawyer: I mean, we do not look behind the act of Legislature, let alone an opinion of a school superintendent a generation ago.

Mr. Rhoads: We are not looking behind it, we are referring to the administrative instructions of the then superintendent, which have conveyed the practice.

Mr. Sawyer: I fail to see what the relevancy would be of what the Superintendent of Schools in 1913 had to think about this practice.

Judge Biggs: Doesn't it amount to something like an administrative ruling, Mr. Sawyer?

Mr. Rhoads: That is it; that was my purpose, sir.

Mr. Sawyer: I would not think so, no, sir.

[fol. 314] Mr. Rhoads: There has been a great deal of argument, sir, and examination in the early stages of this case about practices and policies, and here we are dealing with the State Superintendent and a memorandum which he issued.

Judge Biggs: Have you had an opportunity to examine this?

Mr. Sawyer: Well, I have just now, and again it is a matter of weight, but this is a thing in which we purport to take a gentleman named Nathan C. Schaffer, who was Superintendent of Public Instruction in 1913, and after

spending half an hour here to qualify someone as an expert we are going to take this gentleman as to whether or not on certain questions Protestant, Catholic and Jew are in agreement. It is the substantive religious conclusions he reaches which I think are objectionable.

Judge Biggs: Well, speaking for myself, and I think for the other two members of the Court, I am in doubt about this but I think that we will follow the same practice as before and receive it subject to the motion to strike.

Mr. Rhoads: Thank you, sir.

Judge Biggs: Can you agree on authenticity?

Mr. Rhoads: I think there will be no problem.

[fol. 315] Mr. Sawyer: There will be no question.

Mr. Rhoads: I now offer this as Defendant's Exhibit No. 9, Your Honors, subject to your statement.

Judge Biggs: Let it be so marked.

(Excerpt from brief filed on behalf of Commonwealth of Pennsylvania, as Amicus Curiae, before the Supreme Court of the United States, October Term 1951, No. 9, in the Matter of Doremus v. Board of Education, et al., at pages 3 and 4, was marked Defendant's Exhibit 9.)

Judge Biggs: Mrs. Forer, did you want to say something about this?

Mrs. Forer: If the Court please, the Attorney General unfortunately was called into another courtroom before Judge Grim, but on his behalf I would like to say that the Commonwealth would like leave to file a brief.

Judge Biggs: Oh, we haven't come to that. We will certainly give you that amicus curiae. Wait until we come to that. I thought you were going to address yourself to this particular question. It is quite all right.

Mrs. Forer: We are agreed that this statement by Mr. Stambaugh was made. The effect or weight of it, of course, would be for the Court.

Judge Biggs: Certainly.

Is there anything else?

[fol. 316] Mr. Rhoads: Yes, there is, sir.

\*In connection with Mr. Sawyer's offer of The Catholic Encyclopedia, I wish to offer under the same ruling that Your Honor made earlier with reference to Mr. Sawyer's offer a portion of The Catholic Encyclopedia contained in Volume II, page 543 and 544, which follows Mr. Sawyer's

first excerpt from The Catholic Encyclopedia in his exhibit where he refers to page 543. I don't want to burden Your Honors at this time of the day. I simply would like to offer it, subject to the same ruling that Your Honors made with reference to Mr. Sawyer's offer. I can read it now, if Your Honors want it.

Judge Biggs: No, you need not read it. So admitted subject to the same ruling. Mr. Sawyer I believe has no objection on that ground.

Mr. Sawyer: I have no objection, Your Honor.

(Excerpt from The Catholic Encyclopedia, Robert Appleton Company, New York, 1907, Volume II, pages 543, 544, was marked Defendant's Exhibit 10.)

Mr. Rhoads: By the same token, following Mr. Sawyer's document with reference to The Catholic Encyclopedia, Volume V, page 706, I wish to offer the excerpt which I am presenting, which immediately precedes Mr. Sawyer's offer and is contained in Volume V, page 706, with the [fol. 317]-same understanding, sir. I think that is all.

Judge Biggs: The identical ruling in respect to this offer also.

Mr. Rhoads: Thank you, sir.

(Excerpt from The Catholic Encyclopedia, Robert Appleton Company, New York, 1909, Volume V, page 706, was marked Defendant's Exhibit 11.)

Mr. Rhoads: I now formally move, if Your Honors please, to amend the answer in such manners and in such ways as may be indicated by the evidence as produced in the case.

Judge Biggs: Any objections, Mr. Sawyer?

Mr. Sawyer: No, sir.

Judge Biggs: So ordered.

Mr. Rhoads: Now, Your Honors, we have no further testimony from the defendant's point of view, and unless Mr. Sawyer has we would await your instructions as to what you now wish us to do.

Judge Biggs: You have nothing in rebuttal?

Mr. Sawyer: I have nothing, sir.

Judge Biggs: Very well. Let us leave it this way, then, the case is considered closed so far as the testimony is concerned, except for tomorrow's deposition.

[fol. 476]

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA  
Civil Action No. 24,119

EDWARD LEWIS SCHEMP, SIDNEY GERBER SCHEMP, Individually and as Parents and Natural Guardians of ELLORY FRANK SCHEMP, ROGER WADE SCHEMP and DONNA KAY SCHEMP, 2549 Susquehanna Avenue, Roslyn, Montgomery County, Pennsylvania,

v.

SCHOOL DISTRICT OF ABINGTON TOWNSHIP, PENNSYLVANIA, c/o JAMES F. KOEHLER, 739 Wyndale Avenue, Abington Township, Montgomery County, Pennsylvania, O. H. ENGLISH, 1308 Highland Avenue, Abington Township, Montgomery County, Pennsylvania, EUGENE STULL, 1449 Abington Avenue, Glenside, Montgomery County, Pennsylvania, M. EDWARD NORTHAM, 343 Roberts Avenue, Glenside, Pennsylvania.

Before BIGGS, Circuit Judge, and KIRKPATRICK and KRAFT, District Judges.

OPINION OF THE COURT—Filed September 16, 1959

By BIGGS, Circuit Judge.

The suit at bar is brought by Edward Lewis Schemp and Sidney Gerber Schemp, individually and as parents and natural guardians of Ellory Frank Schemp, Roger Wade Schemp and Donna Kay Schemp, against School District of Abington Township, Montgomery County, Pennsylvania, O. H. English, Superintendent of Abington Township Schools, Eugene Stull, Principal of the Abington Senior High School, and M. Edward Northam, Principal of the Huntingdon Junior High School, located in Abington

Township. The suit is brought under 28 U.S.C. §§ 1343 and 2281, and was heard by a three-judge court pursuant to 28 U.S.C. § 2284. The parent plaintiffs complain on behalf of themselves as parents and as the natural guardians of Ellory, Roger and Donna, their minor children. At the time of the filing of the action, the older son, Ellory, was a student at the Abington Senior High School but graduated from that school prior to the trial, which was held during the summer recess. All the parties are in accord that the application for an injunction is moot as to him.<sup>1</sup>

The complaint alleges that the Pennsylvania statute which provides for the reading of ten verses of the "Holy Bible" by teachers or students<sup>2</sup> is unconstitutional as an establishment of religion and a prohibiting of the free exercise thereof. The complaint makes a similar assertion in respect to the reading of the ten verses in conjunction with the practice of recitation<sup>3</sup> in unison by students and

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<sup>1</sup> We are not barred, however, from considering the evidence given by him, relevant to the practices in the schools of Abington Township.

<sup>2</sup> It will be observed that the Legislature of Pennsylvania did not define the term "Holy Bible". It did not, for example, make any differentiation between the King James Version of the Bible, frequently employed in the religious exercises of Protestant Churches and the Douay Version, the authorized Bible of the Roman-Catholic Church.

<sup>3</sup> Section 1516 of the Public School Act of March 10, 1949, as amended, 24 P.S. Pa. § 15-1516, provides as follows: "At least ten verses from the Holy Bible shall be read, or caused to be read, without comment, at the opening of each public school on each school day, by the teacher in charge: Provided, That where any teacher has other teachers under and subject to direction, then the teacher exercising such authority shall read the Holy Bible, or cause it to be read, as herein directed.

"If any school teacher, whose duty it shall be to read the Holy Bible, or cause it to be read, shall fail or omit so to do, said school teacher shall, upon charges preferred for such failure or omission, and proof of the same, before the board of school directors of the school district, be discharged."

<sup>4</sup> A recitation of the Lord's Prayer is, of course, not covered by the statute.



[fol. 478] teachers of the Lord's Prayer. The plaintiffs also assert, though not in the complaint, that the recitation of the Lord's Prayer in and of itself in the public schools of Abington Township is unconstitutional for similar reasons. The prayers at the end of each count of the complaint are substantially the same and seek declarations of unconstitutionality and the permanent enjoining of the practices complained of.

# I

The parent plaintiffs are of the Unitarian faith and are members of a Unitarian Church in Germantown, Pennsylvania, which they attend regularly together with their three children, Ellory, Roger and Donna. The children also attend Sunday School regularly. Ellory was eighteen years of age at the time of the trial and had attended the Abington Senior High School from which he graduated in June of 1958. Roger was fifteen at the time of the trial and was an eighth grade student in the Huntingdon Junior High School in Abington Township during the academic year previous to the trial. Donna was twelve years old at the time of the trial and was also a student at the Huntingdon Junior High School and in the academic year preceding the trial had been in the seventh grade. All three children testified at the trial and their evidence proves that it was the practice of the various schools of the Township which

The prayer of the fourth count of the complaint is as follows: "WHEREFORE, plaintiffs (the parents) pray this court preliminarily, and after trial of this suit permanently, to enjoin the enforcement, operation, and execution of Section 1516 of the Act of March 10, 1949, P.L. 30, as amended, to declare said act unconstitutional; to declare as unconstitutional the practice of causing the Holy Bible to be read and of directing the saying of the Lord's Prayer at the Abington Township Senior High School and Huntingdon Junior High School, and to enjoin and declare unconstitutional the expenditure of funds for the purchase of Holy Bibles."

See the plaintiffs' brief, Requests for Findings of Fact and Conclusions of Law, and the transcript of the oral arguments.

An injunction against the expenditure of public funds for the purchase of "Holy Bibles" was not pressed by the plaintiffs and is treated as abandoned.

they attended to observe the opening period of each day with a brief ceremony consisting of the reading of ten [fol. 479] verses of the "Holy Bible", followed by a standing recitation in unison of that portion of the New Testament known as the "Lord's Prayer",\* and that generally the ceremony was followed by the familiar Pledge of Allegiance to the Flag.

The testimony of the three children described a number of variations in the manner employed in the execution of this ceremony from school to school. The required ten verses were read either by the "home room" teacher or by students in the "home room", who either volunteered or were selected by rotation. An exception to these practices was recounted by Ellory Schempp who said that after the Senior High School had moved to a new building equipped with a public address system, the Bible was read over the loud speaker in each classroom following which a voice on the loud speaker directed the children to rise and repeat the Lord's Prayer.<sup>9</sup> Donna Schempp testified that during the reading of the Bible a standard of physical deportment and attention of higher caliber than usual was required of the students. Edward L. Schempp, father of the minor plaintiffs, stated that the Bible reading, in the manner in which it was conducted, was "given a degree of authority . . . beyond normal school authority."

The three Schempp children and their father testified also as to items of religious doctrine purveyed by a literal

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\*Matthew 6:9. A directive for the recitation of the Lord's Prayer is included in the "Employees' Handbook and Administrative Guide," issued from the office of O. H. English, Superintendent of Abington Township Schools. The origin of the practice of reciting the Lord's Prayer coupled with Bible reading is obscure, although the practice has endured for over thirty years.

<sup>9</sup> The Bible was read by one of the students enrolled in an elective course, described as the Radio and Television Workshop. W. W. Young, teacher of the course, testified that the students assigned to read the Bible on any particular day could employ the text of his own choosing, and also could select the particular ten verses to be read. In addition to the King James Version, the Douay Version and the Jewish Holy Scriptures were used.

reading of the Bible, particularly the King James Version,<sup>10</sup> [fol. 480] which were contrary to the religious beliefs which they held and to their familial teaching.<sup>11</sup>

Roger and Donna testified that they had never protested to their teachers or other persons of authority in the school system concerning the practices of which they now complain. In fact, on occasion, Donna had volunteered herself to read the Bible. The father, Edward Schempp, testified also that no complaint was lodged by him with the school authorities. Ellory Schempp, however, did complain of the practices, and demonstrated his objection first in November of 1956 by reading to himself a copy of the Koran while the Bible was being read, and refusing to stand during the recitation of the Lord's Prayer. He testified that his home room teacher stated to him that he should stand during the recitation of the Lord's Prayer, and that he then asked to be excused from "morning devotions". Afterwards he was sent to discuss the matter with the Vice-Principal and the School Guidance Counsellor. As a result, for the remainder of the year, Ellory spent the period given over for "morning devotions" each day in the Guidance Counsellor's office. At the beginning of the next academic year, which was Ellory's last in the Abington Township school system, he asked his then home room teacher to be excused from attendance at the ceremony. After discussing the matter with the Assistant Principal, that official told Ellory that he should remain in the home room and attend the morning Bible reading and prayer recitation period as did the other students.<sup>12</sup> This he did for the remainder of

<sup>10</sup> Superintendent English testified that the King James Version of the Bible was purchased by the School, that one copy was issued to every school teacher in the District, and that no other versions of the Bible were ever purchased.

<sup>11</sup> Ellory Schempp testified that he did not believe in the divinity of Christ, the Immaculate Conception, or the concepts of an anthropomorphic God or the Trinity. All of these doctrines were read to him at one time or another during the course of his instruction at the Abington High School. The other two children and Edward L. Schempp, their father, testified similarly.

<sup>12</sup> The reason given by the Assistant Principal, according to Ellory's testimony, was "to show respect and . . . simply to obey

the year. The defendant Superintendent and the School Principals testified that no complaint, other than that of [fol. 481] Ellory Schenipp, had ever been received from any source. This evidence was uncontradicted.

We have the testimony of expert witnesses. Dr. Solomon Grayzel<sup>13</sup> testified that there were marked differences between the Jewish Holy Scriptures and the Christian Holy Bible, the most obvious of which was the absence of the New Testament in the Jewish Holy Scriptures. Dr. Grayzel testified that portions of the New Testament were offensive to Jewish tradition and that, from the standpoint of Jewish faith, the concept of Jesus Christ as the Son of God was "practically blasphemous". He cited instances in the New Testament which, assertedly, were not only sectarian in nature but tended to bring the Jews into ridicule or scorn.<sup>14</sup> Dr. Grayzel gave as his expert opinion that such material from the New Testament could be explained to Jewish chil-

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a school rule; that matters of conscience and religion were not as important here as merely conforming to the school rule." Record of testimony, p. 28.

<sup>13</sup> Dr. Grayzel graduated from the City College of New York City and Columbia University. He attended the Jewish Theological Seminary, was ordained a Rabbi and received a Doctorate of Philosophy from Dropsie College of Philadelphia, an institution of rabbinical, Semitic and Hebrew studies. The Jewish Publication Society of which Dr. Grayzel is the editor, is the publisher of an English translation of the Jewish Bible, *i.e.*, the Holy Scriptures according to the Masoretic Text, and is presently engaged in a retranslation from the Hebrew into English. As a member of the translation committee, Dr. Grayzel stated that he was familiar with the King James Version, the Revised Standard Version and both the Douay and the Knox Catholic Versions. Dr. Grayzel was undoubtedly qualified as an expert witness.

<sup>14</sup> In particular, Dr. Grayzel cited the famous scene portrayed in Matthew 27: the trial of Jesus Christ before Pilate. He pointed out that as related in the Christian New Testament the Jews are portrayed as refusing to exchange Barabbas for Jesus but insisted upon crucifixion in spite of the attempts of Pilate to placate the mob. He cited the washing of hands by Pilate and then the verse 25: "Then answered all the people, and said, His blood be on us, and our children". Concerning this verse Dr. Grayzel stated that it had been the cause of more anti-Jewish riots throughout the ages than anything else in history.

dren in such a way as to do no harm to them. But if portions of the New Testament were read without explanation, they could be, and in his specific experience with children Dr. Grayzel observed, had been, psychologically harmful to the child and had caused a divisive force within the social media of the school.

Dr. Grayzel also testified that there was significant difference in attitude with regard to the respective Books of the Jewish and Christian Religions in that Judaism at [fol. 482] teaches no special significance to the reading of the Bible *per se* and that the Jewish Holy Scriptures are source materials to be studied. But Dr. Grayzel did state that many portions of the New, as well as of the Old Testament contained passages of great literary and moral value.

Dr. Luther A. Weigle, an expert witness for the defense,<sup>15</sup> testified in some detail as to the reasons for and the methods employed in developing the King James and the Revised Standard Versions of the Bible. On direct examination, Dr. Weigle stated that the Bible was non-sectarian.<sup>16</sup> He later stated that the phrase "non-sectarian" meant to him non-sectarian within the Christian faiths. Dr. Weigle stated that his definition of the Holy Bible would include the Jewish Holy Scriptures, but also stated that the "Holy Bible" would not be complete without the New Testament. He stated that the New Testament "conveyed the message of Christians." In his opinion, reading of the Holy Scriptures to the exclusion of the New Testament would be a sectarian practice. Dr. Weigle stated that the Bible was of great moral, historical and literary value. This is conceded by all the parties and is also the view of the court.

<sup>15</sup> Dr. Weigle testified at length as to his experience and background in matters concerning theology. He is an ordained Lutheran Minister and is Dean Emeritus of the Yale Divinity School. He was and is Chairman of the Committee for the preparation of the Revised Standard Version of the Bible. He was Sterling Professor of Religious Education at Yale until he was made Dean Emeritus. There can be no doubt as to Dr. Weigle's qualifications as an expert.

<sup>16</sup> Dr. Weigle, in defining "sectarian", stated: "A movement is sectarian when it is meant to establish the distinctive doctrine of some particular sect as opposed to the doctrine of other sects." Record at p. 252.



We can perceive no substantial contradictions in the testimony of any of the witnesses and we find the operative facts in the instant case to be as stated by them.

## II

The plaintiffs contend that the practices, as described, of the Abington Township schools constituted an establishment of religion and a prohibiting of the free exercise thereof and are therefore a violation of rights guaranteed [fol. 483] by the First Amendment to the Constitution of the United States, made applicable to the States by the Fourteenth Amendment. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

The defendants assert a position which is diametrically opposite to that of the plaintiffs. They contend in substance that a reading without comment of ten verses of the "Holy Bible" at the opening of each school day does not effect, favor or establish a religion or prohibit the free exercise thereof, that freedom of religion or of conscience does not include a right to practice one's beliefs or disbeliefs concerning the Bible by preventing others from hearing it read in the public schools. They contend also that reading without comment of ten verses of the "Holy Bible", of whatever version, is a substantial aid in developing the minds and morals of school children and that the State has a constitutional right to employ such practices in its educational program. They assert as well that the custom of saying the Lord's Prayer does not concern an establishment of religion nor violate the religious conscience of pupil or parent. Finally they contend that there is no compulsion upon the plaintiffs in respect to religious observances and that they have not shown that they have been deprived of any constitutional right.

## III

Certain preliminary questions of law must be disposed of before we can come to the basic issues. These are: (1) Is there a substantial federal question presented for the consideration of this court? While it is obvious from our discussion of the merits that this court considers the fed-



eral questions presented to be substantial; a few words at this point to further demonstrate substantiality are proper. Insofar as we can ascertain neither the dimensions of the rights asserted here by the plaintiffs nor their claimed infringement have been presented for adjudication by the federal courts, and it follows that the federal question involved here is not foreclosed from our determination by [fol. 484] prior decisions. See *Louisville & Nash, R.R. Co. v. Melton*, 218 U.S. 36, 49 (1910). In the light of issues involving First Amendment liberties which the Supreme Court has considered in previous cases, some of which we shall refer to, we cannot say that these plaintiffs have not the right to demonstrate that their religious liberties have been violated.

(2) Is the doctrine of abstention applicable here, particularly in view of recent decisions of the Supreme Court? See *County of Allegheny v. Mashuda Co.*, — U.S. — (1959) (diversity jurisdiction); *Harrison v. NAACP*, — U.S. — (1959) (jurisdiction under 28 U.S.C. § 2284); *Louisiana Power & Light Co. v. City of Thibodaux*, — U.S. — (1959) (diversity jurisdiction). We conclude that the doctrine of abstention does not prohibit this court from proceeding to a determination of the issues involved. We begin with the proposition that a United States district court has the duty to adjudicate a controversy properly before it. *County of Allegheny v. Mashuda Co.*, *supra*. We believe that the limitations upon the discharge of this duty, essential elements of the abstention doctrine, are not applicable here. The Pennsylvania statute is brief and its mandate is clear. No issue of statutory construction is presented by the parties, and we cannot see that the statute lends itself to varying interpretations so that this court should withhold adjudication of the issues until the Courts of Pennsylvania have had the opportunity to construe the Act of March 10, 1949, in the light of state and federal constitutions. No interference with the administrative processes of the Commonwealth of Pennsylvania is involved here, nor by adjudicating the merits of the controversy do we create needless friction by unnecessarily enjoining state officials from executing domestic policies." See *County of Allegheny*

v. Mashuda Co., *supra*. If, as we believe, there are substantial rights involved, and if the merits compel a decision in favor of the plaintiffs, the resulting restraint on the [fol. 485] School District cannot issue "unnecessarily". See *Doud v. Hodge*, 350 U.S. 485, 487 (1956)."

(3) Do the children and the parents possess the standing to maintain the suit at bar? This is not a case where the jurisdictional issue of standing to sue is easily separated from consideration of the merits. Nonetheless, we can say that the alleged injury is one which, if proven, is direct as to them and not merely derivative from some injury to school children and their parents generally. The standing of the children is similar to that of the minor plaintiffs in *Brown v. Board of Education*, 347 U.S. 483 (1954), *Ellory* excepted, his case having become moot. As to the parents' standing to bring suit in their own right, we believe that they, as the natural guardians of their children, having an immediate and direct interest in their spiritual and religious development, are possessed of the requisite standing in that this interest is alleged to be encroached upon. Note the standing accorded to the parent plaintiffs in *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948), and particularly in *Zorach v. Clauson*, 343 U.S. 306 (1952), n.4.

#### IV

We come now to the basic issues. It is clear that the plaintiffs allege in their complaint that the practice of reading the "Holy Bible" with or without the addition of the recitation of the Lord's Prayer violates their constitutional rights. They argue also that the compulsory recital of the Lord's Prayer, *et cetera*, standing alone, *or*, not in conjunction with Bible reading, is "sectarian". It might also be argued

"The plaintiffs' brief states: 'A practice of having a religious ceremony which consists of solely of the reading of a Bible and/or the mere recitation of the Lord's Prayer is sectarian. . . . If this issue were presented on the facts this court is constituted, would be entitled to adjudicate it. See note 8, *supra*, and *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 357 F.2d 1 (3 Cir. 1959).'

with equal force that the compulsory recital of the Lord's Prayer, solely, standing alone, constitutes an establishment [fol. 486] of religion and a prohibiting of the free exercise thereof. But we do not and cannot reach issues relating to a ceremony which consists in the recital of the Lord's Prayer, Bible reading being omitted therefrom. Such a case is not before us. It could be argued, of course, that because the Bible verses were never read without being followed by the recital of the Lord's Prayer, the reading and the recital constitute a unitary whole which cannot be separated effectively for purposes of adjudication and only that unit, reading and recital together, is before us. The parties have not made such a contention and we do not think that it would be a valid one. The reading of the ten verses preceded the recital of the Lord's Prayer and was separated from it on every occasion by an interval of time, however slight. We conclude that we are entitled to pass on and do pass on (1) the constitutional issues presented by the reading of ten verses of the Bible, and (2) the constitutional issues raised by the reading of the Bible verses followed by the recital of the Lord's Prayer.

The Legislature prescribed the reading of the "Holy Bible". While many versions of the Bible exist, all are known primarily as books of worship. Their use in this connection comes first to mind. Inasmuch as the verses of the Bible address themselves to, or are premised upon a recognition of God, the Bible is essentially a religious work. To characterize the Bible as a work of art or literary or historical significance, and to refuse to admit its essential character as a religious document would seem to us to be unrealistic. The question is, accepting the "Holy Bible" as a religious document, regardless of the version involved, is its use in the manner prescribed by the statute violative of the terms of the First Amendment?

During the course of cross examination of Dr. Weigle, the following passage from his book, "The English New Testament," was quoted: "The message of the Bible is the central thing, its style is but an instrument for conveying the message. The Bible is not a mere historical document to be preserved. And it is more than a classic of English literature to be cherished and admired. The Bible contains the Word of God to man." Record at p. 270.

[fol. 487] The verses of the Bible, though they are of great literary merit, are embodied in books of worship. Regardless of the version, devoted primarily to bringing man in touch with God.<sup>19</sup> If study of the Bible as an artistic work, a treasury of moral truths, or historical text can be separated from the espousal of doctrinal matters and religiousness, we should find no objection. But the manner in which the Bible is employed as required by the legislative fiat does not effect this division. The daily reading of the Bible, buttressed with the authority of the State and, more importantly to children, backed with the authority of their teachers, can hardly do less than inculcate or promote the inculcation of various religious doctrines in childish minds. Thus, the practice required by the statute amounts to religious instruction, or a promotion of religious education. It makes no difference that the religious "truths" inculcated may vary from one child to another. It also makes no difference that a sense of religion may not be instilled. In *Everson v. Board of Education*, 330 U.S. 1, 15 (1947), the Supreme Court stated, "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."<sup>20</sup> In our view, inasmuch as the Bible deals with man's relationship to God and the Pennsylvania statute may<sup>20</sup> require a daily reminder of that relationship, that statute aids all religions. Inasmuch as the "Holy Bible" is a Christian document, the practice aids and prefers the Christian religion.<sup>21</sup>

In *Illinois ex rel. McCollum v. Board of Education*, *supra*, where children were released from classes for a thirty to

<sup>19</sup> See Note 18, *supra*.

<sup>20</sup> We use "may" since there are verses in the Bible which read along, teach moral truths independent of a God to man relationship.

<sup>21</sup> Dr. Weigle said, as we have stated at an earlier point in this opinion, that the "Holy Bible" would be incomplete without the New Testament, and that the New Testament conveyed the message of Christians.

forty-five minute period of religious instruction each week by the minister, rabbi, or priest of their choice in school [fol. 488] classrooms; and where children not choosing to do this were required to go to some other place in the building in pursuit of their secular studies, the Supreme Court declared the practice violative of the First Amendment. In the case at bar the religious instruction is conducted, not by persons who visit the school building by invitation but by the teachers themselves, by mandates of the Legislature of Pennsylvania and of the Superintendent of Schools. See notes 3 and 8 *supra*. Thus, strikingly, has the Commonwealth of Pennsylvania supported the establishment of religion:

The reading of the Bible without comment, the defendants assert, permits each listener to interpret what he hears in the fashion he desires, and that therefore there is no inculcation of religion. This argument falls for two reasons. First, it either ignores the essentially religious nature of the Bible, or assumes that its religious quality can be disregarded by the listener. This is too much to ignore and too much to assume. The religiousness of the Bible, we believe, needs no demonstration. Children cannot be expected to sift out the religious from the moral, historical or literary content. Second, the testimony of the Schempps and Dr. Grayzel<sup>22</sup> proves that interpretations of the Bible, dependent upon the inclinations of scholars and students, can result in a spectrum of meanings, beginning at one end of the spectroscopic field with literal acceptance of the words of the Bible, objectionable to Unitarians such as the Schempps, and ending in the vague philosophical generalities condemned by fundamentalists.<sup>23</sup> Of course children will interpret the Bible and will do so in terms of their religious instruction and in such a way as to make what they hear conform to their own religious commitments.

<sup>22</sup> See especially note 14, *supra*.

<sup>23</sup> We note parenthetically the statement of the Court in *West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624 (1943), speaking of the flag and the flag salute at p. 632-633: "A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn."



generally those instilled by their parents. A contrary view seems to us to be untenable.

[fol. 489] It is clear from the evidence that the school children had to maintain, during the course of the morning exercises, a respectful mien more in keeping with a devotional or religious rite than with ordinary classroom instruction. The reading of the ten verses without comment was followed by a recital of the Lord's Prayer. The combination of the reading of the ten verses of the Holy Bible, followed immediately by the recitation of the Lord's Prayer, in our opinion gives to the morning exercises a devotional and religious aspect. Indeed, the morning exercises were referred to on frequent occasions by the students as "morning devotions". Counsel for the School Board referred to the ceremony as "devotional services". The addition of the Flag Salute to the ceremony cannot be deemed to detract from the devotional quality of the morning exercises. Our backgrounds are colored by our own experiences and many of us have participated in such exercises as those required in the Abington Township schools in our childhood. We deemed them then and we deem them now to be devotional in nature, intended to inculcate religious principles and religious beliefs.

The evidence adduced by Abington Township that several versions of the Bible and also the Jewish Holy Scriptures have been used proves only that the religion which is established is either sectless or is all-embracing, or that different religions are established equally. But none of these conditions, assuming them to exist, purges the use of the Bible as prescribed by the statute of its constitutional infirmities.<sup>21</sup>

Whether or not mere reading of the Bible, without comment, is a religious ceremony, a state supported practice of daily reading from that essentially religious text in the public schools is, we believe, within the proscription of the First Amendment. "[T]he First Amendment rests upon the premise that both religion and government can [fol. 490] best work to achieve their lofty aims if each is

<sup>21</sup> Cf. the facts of *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948).



left free from the other within its respective sphere." Illinois *ex rel. McCollum v. Board of Education*, *supra*, 333 U.S. at p. 212.

We conclude also, that the reading of the Bible as required by the Pennsylvania statute prohibits the free exercise of religion. The sanction imposed upon the school teachers is discharge from their offices if they fail to observe the requirements of the statute. It is true that no sanction is directly imposed upon the school children who fail to observe the provisions of the statute but it cannot be contended successfully that where a course of conduct is compelled for school teachers and school superintendents, that they will not use every effort to cause the children committed to their guidance and care to form an audience for the reading of the Bible according to the terms of the statute. Such compulsion may be disguised but would be effective nonetheless. Ellory Schenapp, in his last year at the Abington Senior High School was directed to attend the exercises by the Assistant Principal of his school, acting under the authority of his office. See note 12, *supra*. At one time he was directed by his home room teacher to stand during the recitation of the Lord's Prayer. The compulsion, on the other hand, may be subtle and thus particularly effective, in respect to children of tender years, such as Roger and Donna. "The law of imitation operates, and non-conformity is not an outstanding characteristic of children." Illinois *ex rel. McCollum v. Board of Education*, *supra*, at p. 227 (concurring opinion). The argument made by the defendants that there was no compulsion ignores reality and the forces of social suasion. Tudor v. Board of Education, 14 N.J. 31, 100 A.2d 867 (1953) at pp. 866-868. Moreover, attendance at school is required by the law of Pennsylvania of every child of school age under criminal penalties imposed on parents or other persons in *loco parentis*. 24 P.S. Pa. § 131327 (Supp. 1959). § 131333 [fol. 491] (1949). This mandatory requirement of school attendance puts the children in the path of the compulsion.

The pressures of the statute and the attitudes of both school officials and the teaching staff were directed to all

See note 3, *supra*.

of the children in the Abington Township schools referred to and not to the Schempps alone, but only the latter have rebelled. We think it is misleading to suggest that because only the Schempps have objected that the statute prescribes conduct which is not compulsory both as to teachers and pupils. Indeed the lack of protest may itself attest to the success and the subtlety of the compulsion. One can say with verity that in schools conducted in accordance with the legislative fiat, the reading of the "Holy Bible" is compulsory as to teachers and pupils.

In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), school children were ordered by resolution of the Board of Education to salute the flag, and refusal to do so was regarded as an act of insubordination. The resolution was objected to by members of the sect of Jehovah's Witnesses, who refused to salute the flag considering it to be a "graven image". The resolution was struck down as unconstitutional. Such a compromising of religious conscience could not be countenanced. The daily reading of the Bible, operating upon the receptive minds of children compels them to listen with attention. This indoctrinates them with a religious sense. This under the circumstances at bar constitutes an interference with the free exercise of religion.

Even more clearly are the rights of the parents interfered with. Parents may well wish that their children develop a religious sensibility. If the faith of a child is developed inconsistently with the faith of the parent and contrary to the wishes of the parent, interference with the familial right of the parent to inculcate in the child the religion the parent desires, is clear beyond doubt. The right of the parent to teach his own faith to his child, or [fol. 492] to teach him no religion at all is one of the foundations of our way of life and enjoys full constitutional protection.

The statement of the Supreme Court in *West Virginia State Board of Education v. Barnette*, *supra*, at p. 630 that "[T]he refusal of these persons [the plaintiffs] to participate in the [flag salute] ceremony does not interfere with or deny rights of others to do so" does not compel a con-

trary result, as the defendants here urge. While others may have a right to salute the flag in public schools, we think, as our previous discussion demonstrates, that there is no corresponding right to have the Bible read in public schools in the manner required.

Having characterized the morning exercises in the Abington Township schools as a religious ceremony, it requires but little citation of authority to demonstrate that these exercises, conducted under the aegis of the Commonwealth of Pennsylvania, are violative of the terms of the First Amendment. What we have said in respect to *Illinois ex rel. McCollum v. Board of Education*, *supra*, and its application to religious instruction, applies with at least equal force to the conducting of the exercises as religious ceremonies.

We hold the statute in issue to be unconstitutional.

## V

In addition to those set out in the foregoing opinion we make the following additional findings of fact and conclusions of law. Rule 52, Fed. R. Civ. Proc., 28 U.S.C.

### FINDINGS OF FACT:

(1) Plaintiffs Edward Louis Schempp and Sidney Gerber Schempp are the parents and natural guardians of minor plaintiffs Ellory Frank Schempp, Roger Wade Schempp, and Donna Kay Schempp, residing in Montgomery County, Pennsylvania.

[fol. 493] (2) All of the defendants reside or are located within the jurisdiction of the United States District Court for the Eastern District of Pennsylvania.

(3) Minor plaintiff Ellory Schempp was a student at Abington Senior High School at the time this action was brought but graduated therefrom prior to the trial of this action.

(4) Minor plaintiff Roger Schempp was an eighth grade student in the Huntington Junior High School, Abington Township, during the academic year ending 1958 and he is presently a student in said school.

(5) Minor plaintiff Donna Schempp was a seventh grade student in the Huntingdon Junior High School, Abington Township, during the academic year ending 1958 and she is presently a student in said school.

(6) In each of said schools attended by the minor plaintiffs there is an opening period each day observed by the reading of ten verses of the Bible.

(7) The reading of the Bible as aforesaid each day is followed by a standing recitation in unison of that portion of the New Testament known as the Lord's Prayer.

(8) The attendance of all students in both of the aforesaid schools at the ceremony of the Bible reading and recitation of the Lord's Prayer is compulsory.

(9) The practice of the daily reading of ten verses of the Bible in the public schools of Abington Township constitutes religious instruction and the promotion of religiousness.

(10) The practice of the daily reading of ten verses of the Bible together with the daily recitation of the Lord's Prayer in the public schools of Abington Township is a religious ceremony.

[fol. 494]

#### CONCLUSIONS OF LAW:

(1) The court has jurisdiction of the parties and the subject matter of this litigation under Sections 1343, 2281, Title 28, United States Code. The instant three-judge court was properly convened pursuant to Section 2284, Title 28, United States Code and has before it substantial federal questions for adjudication.

(2) The practice of reading ten verses of the Bible each day in the public schools of Abington Township is pursuant to the mandatory provisions of Section 1516 of the Pennsylvania Public School Code of March 10, 1949, as amended.

(3) Section 1516 of the Pennsylvania Public School Code of March 10, 1949, as amended, violates the First Amendment to the United States Constitution as applied to the

states by the Fourteenth Amendment in that it provides for an establishment of religion.

(4) Section 1516 of the Public School Code of March 10, 1949, as amended, violates the First Amendment to the United States Constitution as applied to the states by the Fourteenth Amendment in that it interferes with the free exercise of religion.

(5) Said practice of compulsory mass recitation of the Lord's Prayer by students in the public schools of Abington Township violates the First Amendment to the United States Constitution as applied to the states by the Fourteenth Amendment in that it interferes with the free exercise of religion.

(6) The combined practice of Bible reading and mass recitation of the Lord's Prayer by students in the public schools of Abington Township violates the First Amendment to the United States Constitution as applied to the states by the Fourteenth Amendment in that said practice [fol. 495] constitutes an establishment of religion and an interference with the free exercise of religion.

A decree will be entered enjoining the practices complained of, in accordance with this opinion, and declaring Section 1516 of the Public School Act of March 10, 1949, as amended, 24 P.S. Pa. § 15-1516, unconstitutional.

John Biggs, Jr., U.S. Circuit Judge.

September 16, 1959.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 24110

EDWARD L. SCHEMPF, et al.

v.

SCHOOL DISTRICT OF ABINGTON TOWNSHIP, et al.

FINAL DECREE—September 16, 1959

Plaintiffs, having filed their Complaint on February 18, 1958, and the defendants having appeared by their counsel, C. Brewster Rhoads, Esquire, on March 6, 1958, and a three judge court having been convened pursuant to Section 1343 of Title 28, United States Code, and a preliminary conference having been held in chambers attended by counsel for the plaintiffs and the defendants and it having been there agreed that defendants would answer on the merits and that hearing would be held for both preliminary and final injunction, and an answer having been filed by defendants on April 25, 1958, and a hearing having been held and testimony taken by the court on August 5 and 6, 1958, and November 25 and 26, 1958, and the deposition of Charles H. Boehm, Superintendent of Public Instruction of the Commonwealth of Pennsylvania, having, by stipulation, been taken by counsel without the presence of the court, and briefs having been filed and argument having been heard, now therefore, it is

Ordered, Adjudged and Decreed as follows:

The defendants are perpetually enjoined and restrained from reading and causing to be read, or permitting anyone [fol. 497] subject to their control and direction to read, to students in the public schools of Abington Township, Montgomery County, Pennsylvania, any work or book known as The Holy Bible, as directed by Section 1546 of



the Pennsylvania Public School Code of March 10, 1949, P.L. 30, as amended, or as part of any ceremony, observance, exercise or school routine; provided, that nothing herein shall be construed as interfering with or prohibiting the use of any books or works as source or reference material.

By the Court,

John Biggs, Jr., United States Circuit Judge, William H. Kirkpatrick, C. William Kraft, Jr., United States District Judges.

Dated: September 16, 1959.

[fol. 498] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

Present: Biggs, Circuit Judge, and Kirkpatrick and Kraft, District Judges.

ORDER AMENDING OPINION—September 21, 1959

And Now, to wit, this 21st day of September, 1959, it is

Ordered that the opinion filed herein on September 16, 1959, be and the same hereby is amended by striking out the whole of the Fifth Conclusion of Law appearing on page 19 of the opinion and by striking out the figure "(6)" also appearing on page 19 of the opinion and substituting in lieu thereof the figure "(5)".

By the Court,

John Biggs, Jr., United States Circuit Judge.

## SUPREME COURT OF THE UNITED STATES

No. 297—October Term, 1960

SCHOOL DISTRICT OF ABINGTON TOWNSHIP;

PENNSYLVANIA, et al., Appellants,

vs.

EDWARD LEWIS SCHEMP, et al.

## MANDATE OF THE SUPREME COURT OF THE UNITED STATES

Appeal from the United States District Court for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Pennsylvania; and was duly submitted.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said United States District Court in this cause be, and the same is hereby, vacated with costs; and that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of Pennsylvania for such further proceedings as may be appropriate in light of Act No. 700 of the Laws of the General Assembly of the Commonwealth of Pennsylvania, passed at the Session of 1959 and approved by the Governor of the Commonwealth on December 17, 1959.

It is farther ordered that the said appellants, School District of Abington Township, Pa., et al. recover from Edward Lewis Schempp, et al. One Hundred Dollars (\$100) for their costs herein expended and have execution therefor.

October 24, 1960

Clerk's costs \$100

[Vol. 527]

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA  
Civil Action No. 24119

EDWARD LEWIS SCHEMP, SIDNEY GERBER SCHEMP, individually and as parents and natural guardians of ELLORY FRANK SCHEMP, ROGER WADE SCHEMP and DONNA KAY SCHEMP

v.

SCHOOL DISTRICT OF ARINGTON TOWNSHIP, PENNSYLVANIA, JAMES F. KOEHLER, O. H. ENGLISH, EUGENE STULL and M. EDWARD NORTHAM

MOTION FOR LEAVE TO FILE A SUPPLEMENTAL PLEADING UNDER  
RULE 15(d)—Filed January 4, 1961

And Now come the plaintiffs and move the Court for leave to file a supplemental pleading by way of amendment to the Complaint in the above-styled action in the following respects:

## I.

By striking from the caption "Ellory Frank Schempp" and by deleting paragraphs 8 and 12 pertaining to Ellory Frank Schempp.

## II.

By adding to paragraph 11 of the Complaint following the citation of the Act of the Pennsylvania legislature the words "as further amended by the Act of December 17, 1959, P. L. 700", deleting the text of the statute from paragraph 11 of the Complaint, and substituting the following text:

"At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from

such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian."

Henry W. Sawyer, III, Attorney for Plaintiffs.

[fol. 533]

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

Present: Biggs, Circuit Judge, and Kirkpatrick and Kraft,  
District Judges.

ORDER GRANTING LEAVE TO CHARLES H. BOEHM TO INTERVENE  
AS A DEFENDANT—March 6, 1961

And Now, to wit, this 6th day of March, 1961, it is

Ordered that the motion of Charles H. Boehm, Superintendent of Public Instruction, Commonwealth of Pennsylvania, for leave to intervene as a defendant in the above entitled action under Rule 24 of the Federal Rules of Civil Procedure be and the same hereby is granted.

By the Court,

John Biggs, Jr., United States Circuit Judge, Specially Designated.

[fol. 534]

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA  
Civil Action No. 24119

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EDWARD LEWIS SCHEMPP, SIDNEY GERBER SCHEMPP, indi.  
vidually and as parents and natural guardians of  
ELLORY FRANK SCHEMPP, ROGER WADE SCHEMPP and  
DOXNA KAY SCHEMPP

v.

SCHOOL DISTRICT OF ABINGTON TOWNSHIP, PENNSYLVANIA,  
JAMES F. KOEHLER, O. H. ENGLISH, EUGENE STULL and  
M. EDWARD NORTHAM

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Before Biggs, Circuit Judge, Kirkpatrick, Senior District  
Judge, and Kraft, District Judge.

OPINION AND ORDER GRANTING LEAVE TO APPELLEES TO FILE  
SUPPLEMENTAL PLEADING UNDER RULE 15(d)—June 22, 1961

On September 17, 1959 we entered a judgment declaring unconstitutional Section 1516 of the Pennsylvania Public School Code of March 10, 1949 as amended. See 177 F. Supp. 398 (1959). On November 12, 1959 the defendants appealed to the Supreme Court of the United States. On December 23, 1959 they filed a motion in this court pursuant to Rule 60(b), Fed. R. Civ. Proc., 28 U.S.C., for relief from the judgment entered following our opinion in this case. The motion was based on the fact that Act No. 700 of the Laws of the General Assembly of Pennsylvania, passed at the Session of 1959 (effective December 17, 1959), and approved by the Governor of the Commonwealth of Pennsylvania on December 17, 1959, amended the Act of March 10, 1949 (P.L. 30), relating to Bible reading in the public schools of Pennsylvania. The motion was denied by this court on June 9, 1960 for want of jurisdiction.

[fol. 535] On October 24, 1960 the Supreme Court handed down a *per curiam* opinion and order, 364 U.S. 298, vacating our judgment and remanding the case for such further proceedings as might be appropriate in the light of Act No. 700.

On January 4, 1961 a motion was filed by the plaintiffs for leave to file a supplemental pleading under Rule 15(d), Fed. R. Civ. Proc., 28 U.S.C., to amend the complaint by striking from the caption the words "Ellory Frank Schempp", and by deleting paragraphs 8 and 12, and by adding to paragraph 11 the words "as further amended by the Act of December 17, 1959 (P.L. 700)," and by deleting the text of the statute from paragraph 11 and substituting the following, "At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian."

The defendants object to the filing of the proposed supplemental pleading on the ground that to allow it would be an abuse of our discretion. We conclude that a useful purpose would be served by permitting it to be filed, and that *prima facie* it states a cause of action cognizable by a three-judge court. Accordingly we will grant the plaintiffs' motion but in so ruling we desire to make it clear that we decide no more than that which we have stated.

John Biggs, Jr., Circuit Judge, William H. Kirkpatrick, Senior District Judge, William Kraft, Jr., District Judge.

Dated: June 22nd, 1961.



[fol. 536]

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA  
Civil Action No. 24119

EDWARD LEWIS SCHEMP, SIDNEY GERBER SCHEMP, individually and as parents and natural guardians of ELLORY FRANK SCHEMP, ROGER WADE SCHEMP and DONNA KAY SCHEMP

v.

SCHOOL DISTRICT OF ABINGTON TOWNSHIP, PENNSYLVANIA,  
JAMES F. KOEHLER, O. H. ENGLISH, EUGENE STULL and  
M. EDWARD NORTHAM

ORDER—June 22, 1961

Present: Biggs, Circuit Judge, and Kirkpatrick, Senior District Judge and Kraft, District Judge.

And Now, to wit, this 22nd day of June, 1961, it is

Ordered that leave be and the same hereby is granted to the plaintiffs to file the Pleading designated as a "Supplemental Pleading Under Rule 15(d)", Fed. R. Civ. Proc., 28 U.S.C.; and it is

Further Ordered that the Supplemental Pleading referred to be and the same is hereby filed and defendants shall plead thereto within twenty (20) days.

By the Court,

John Biggs, Jr., United States Circuit Judge.

[fol. 537.]

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

[Title omitted]

**ANSWER TO SUPPLEMENTAL PLEADING—Filed July 10, 1961**

And Now comes School District of Abington Township, Pennsylvania, c/o James F. Koehler, O. H. English, Eugene Stull, and M. Edward Northam, defendants above named by their attorney and make answer to the Supplemental Pleading as follows; stating that wherever in this Answer the defendants allege that they do not know the truth or falsity of an allegation of the plaintiffs or where an allegation is denied for lack of sufficient information, it is the intent and meaning of the defendants that the averment of such lack of knowledge or information shall have the meaning that the defendants are without knowledge or information sufficient to form a belief as to the truth of the corresponding averment of the Supplemental Pleading.

[fol. 538]

**First Defense**

1. Paragraph 1 of the Supplemental Pleading consists of conclusions of law requiring no answer.

2. It is admitted that all of the defendants reside within the Eastern District of Pennsylvania.

3. Admitted.

4. Admitted.

5. Admitted.

6. Denied for lack of sufficient information.

7. Admitted.

8. Not answered, as Paragraph 8 has been deleted in Supplemental Pleading.

9. Denied; except that defendants admit that in the Abington Senior High School prior to the commencement

of classes a public address system which is broadcast into the classrooms is used for the purpose of making various school announcements, conducting the ceremony of the flag salute, and the reading of ten verses of the Holy Bible without comment by a student or teacher who has volunteered to read; and defendants further admit that immediately after such Bible reading the students in the classrooms, excepting those who have been excused because they do not desire to listen to such Bible reading, rise and may, if they so desire, say the Lord's Prayer.

10. Denied; but defendants admit that voluntary participation in the practices set forth in Paragraph 9 of this Answer has been carried out by defendants at the Abington Senior High School since December 17, 1959 and continues to the present time pursuant to the provisions of the Act of December 17, 1959, P. L. 700.

[fol. 539] 11. Admitted.

12. Not answered, as Paragraph 12 has been deleted in Supplemental Pleading.

13. Denied; except that defendants admit that the Abington Senior High School possesses, among the many books used by it for educational purposes, copies of the Holy Bible, some of which may have been purchased with funds of the School District of Abington Township, the amounts paid for such Holy Bibles being negligible.

14. Denied.

15. Admitted.

16. Denied. Roger Wade Schempp has concluded the eleventh grade and in September, 1961, will enter twelfth grade at the Abington Senior High School.

17. through 20. Denied, and defendants further allege that none of the plaintiffs is now a student at the Huntingdon Junior High School and therefore allege that the practices at such school are irrelevant and require no further answer.

21. Denied. Donna Kay Schempp has concluded tenth grade and in September, 1961, will enter the eleventh grade at the Abington Senior High School.

22. Defendants incorporate by reference paragraphs 11, 15, 17 and 20 of this Answer as though herein set forth in full.

23. Denied.

24. Defendants incorporate by reference paragraphs 7 to 23 inclusive of this Answer as though herein set forth in full.

25. Denied.

[fol. 540]

### Second Defense

This Court should not adjudicate the constitutionality of Section 1516 of the Act of the Commonwealth of Pennsylvania of March 10, 1949, P. L. 30, as recently amended because the constitutionality of such amended statute is fairly open to interpretation and the Supreme Court of Pennsylvania has not been afforded a reasonable opportunity to interpret or determine the validity of such amended statute.

### Third Defense

The statutory practice of Bible reading pursuant to the Act of December 17, 1959, P. L. 700, is voluntary in character. No pupil nor teacher may be compelled to participate therein. The plaintiffs, therefore, have no standing to bring this action since they are not, and do not allege that they are, being deprived of either their property or their absolute freedom to exercise their religious beliefs as their consciences may direct.

### Fourth Defense

The Supplemental Pleading fails to state a claim against defendants upon which relief can be granted in that no violation of any rights, privileges or immunities secured by the Constitution of the United States or otherwise, is set forth.

Wherefore, defendants ask that the Supplemental Pleading be dismissed at plaintiffs' cost.

C. Brewster Rhoads, Attorney for Defendants.

[fol. 541]

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

ANSWER OF CHARLES H. BOEHM TO  
SUPPLEMENTAL PLEADING—Filed July 11, 1961

And Now comes Charles H. Boehm, Superintendent of Public Instruction, Commonwealth of Pennsylvania, intervenor-defendant above named, by his attorneys, Anne X. Alpern, Attorney General, and John D. Killian III, Deputy Attorney General, and makes Answer to the Supplemental Pleading as follows: stating that wherever in this Answer the intervenor-defendant alleges that he does not know the truth or falsity of an allegation of the plaintiffs or where an allegation is denied for lack of sufficient [fol. 542] information, it is the intent and meaning of the intervenor-defendant that the averment of such lack of knowledge or information shall have the meaning that the intervenor-defendant is without knowledge or information sufficient to form a belief as to the truth of the corresponding averment of the Supplemental Pleading.

First Defense

1. Paragraph 1 of the Supplemental Pleading consists of conclusions of law requiring no answer.

2. It is admitted that all of the defendants reside within the Eastern District of Pennsylvania.

3. Admitted.

4. Admitted.

5. Admitted.

6. Denied for lack of sufficient information.

7. Admitted.

8. Not answered, as paragraph 8 has been deleted in Supplemental Pleading.

9. Denied; except that intervenor-defendant admits that in the Abington Senior High School prior to the commencement of classes a public address system which is broadcast into the classrooms is used for the purpose of making various school announcements, conducting the ceremony of the flag salute, and the reading of ten verses of the Holy Bible without comment by a student or teacher who has volunteered to read; and intervenor-defendant further admits that immediately after such Bible reading the students in the classrooms, excepting those who have been excused because they do not desire to listen to such Bible [fol. 543] reading, rise and may, if they so desire, say the Lord's Prayer.

10. Denied; except that intervenor-defendant admits that the practices set forth in paragraph 9 of this Answer have been in operation by the defendants at the Abington Senior High School since December 17, 1959 and continue to the present time.

11. Admitted.

12. Not answered, as paragraph 12 has been deleted in Supplemental Pleading.

13. Denied; except that intervenor-defendant admits that the Abington Senior High School possesses, among the many books used by it for educational purposes, copies of the Holy Bible, some of which may have been purchased with funds of the School District of Abington Township, the amounts paid for such Holy Bibles being negligible.

14. Denied.

15. Admitted.

16. Denied. Roger Wade Schempp has concluded the eleventh grade and in September, 1961 will enter twelfth grade at the Abington Senior High School.

17. through 20. Denied, and intervenor-defendant further alleges that none of the plaintiffs is now a student at



the Huntingdon Junior High School, and therefore alleges the practices at such school are irrelevant and require no further answer.

21. Denied. Donna Kay Schempp has concluded tenth grade and in September, 1961 will enter the eleventh grade at the Abington Senior High School.

22. Intervenor-defendant incorporates by reference paragraphs 11, 15 and 17 through 20 of this Answer as though herein set forth in full.

[fol. 544] 23. Denied.

24. Intervenor-defendant incorporates by reference paragraphs 7 to 23 inclusive of this Answer as though herein set forth in full.

25. Denied.

### Second Defense

This Court should not adjudicate the constitutionality of Section 1516 of the Act of the Commonwealth of Pennsylvania of March 10, 1949 (P.L. 30), as recently amended, because the constitutionality of such amended statute is fairly open to interpretation and the Supreme Court of Pennsylvania has not been afforded a reasonable opportunity to interpret or determine the validity of such amended statute.

### Third Defense

The statutory practice of Bible reading pursuant to the Act of December 17, 1959 (P.L. 700), is voluntary in character. No pupil nor teacher may be compelled to participate therein. The plaintiffs, therefore, have no standing to bring this action since they are not, and do not allege that they are, being deprived of either their property or their absolute freedom to exercise their religious beliefs as their consciences may direct.

### Fourth Defense

The Supplemental Pleading fails to state a claim against defendants and intervenor-defendant upon which relief can

be granted in that no violation of any rights, privileges or [fol. 545] immunities secured by the Constitution of the United States or otherwise, is set forth.

Wherefore, intervenor-defendant asks that the Supplemental Pleading be dismissed at plaintiffs' cost.

John D. Killian III, Deputy Attorney General, Anne X. Alpern, Attorney General, Attorneys for Intervenor-Defendant.

[fol. 546]

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

Philadelphia, Pa.

**Excerpts From Transcript of Trial, October 17, 1961**  
**—(Hearing on Amended Complaint)**

[fol. 547] Before Hon. John Biggs, Jr., Chief Judge, Third Judicial District, Hon. C. William Kraft, Jr., District Court Judge, Hon. William H. Kirkpatrick, District Court Judge.

**APPEARANCES**

Present: Henry W. Sawyer, 3rd, Esq., and Wayland H. Elsbree, Esq., for the plaintiffs.

C. Brewster Rhoads, Esq., Percival R. Rieder, Esq., and Philip H. Ward, III, Esq., for the defendants.

Theodore R. Mann, Esq., for American Jewish Congress, Amicus Curiae.

Sydney C. Orlofsky, Esq., for Jewish Community Relations Counsel of Greater Philadelphia, Amicus Curiae.

John D. Killian, III, Esq., Assistant Attorney General of the Commonwealth of Pennsylvania, for the Commonwealth of Pennsylvania.

[fol. 550] EVIDENCE ON BEHALF OF PLAINTIFFS

EDWARD L. SCHEMP, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Sawyer:

Q. Mr. Schempp, you are one of the plaintiffs in this case and you have previously testified; is that correct?

A. That's right.

Q. And at that time, Mr. Schempp, I believe you had three children in the schools of Abington Township. Do you have any children in those schools at this time?

A. One oldest child has moved on to college but two younger children are still in Abington High School.

Q. And did it come to your attention, Mr. Schempp, that the so-called Bible Reading Statute of Pennsylvania was amended?

A. I am aware of that.

Q. And what is your knowledge of it, that that amendment provides for?

Mr. Rhoads: That I object to. The statute speaks for itself.

Judge Biggs: I think that is correct.

Mr. Sawyer: Of course, this will have to be a leading [fol. 551] question, Your Honor.

Judge Biggs: Put a leading question.

By Mr. Sawyer:

Q. Were you aware of the provision which enabled you to have your children excused from the Bible reading ceremony?

A. I am aware of that.

Q. Did you consider whether or not you would elect to utilize that provision with respect to your two children?

A. We considered it very seriously.

Q. What conclusion did you come to?

Mr. Rhoads: That is objected to, sir. I have no objection to the mere statement of the fact that no excuse was proffered or requested on the part of the Schempps, but I certainly object, sir, to a discussion as to the reasons which led for his doing or not doing what the Act provided.

Judge Biggs: Suppose they have a religious basis, Mr. Rhoads, as I assume they have; is he not entitled to explain the basis of his objections as they are founded in his religion?

Mr. Rhoads: It would seem to me, sir, that it is impossible for this plaintiff, having testified as he did before, to now say that a religious belief led me to refuse or not to elect [fol. 552] to do something that the act gives him an opportunity to do.

Frankly, it is a little difficult for me to see what his religious beliefs may have to do with whether or not he asked to have his children excused.

Judge Biggs: We think the form of the question is objectionable, Mr. Sawyer. This is a rather technical approach. Perhaps it is better to be a little bit technical at this stage. I am not entirely clear about it but I think he has already stated that he desired not to make use of the exception.

Has he stated that?

Mr. Sawyer: He said he considered it very carefully and my last question was what conclusion did he reach.

Judge Biggs: Well, let's find out what he did first or did not do first before we come to any question as to why he did or did not do it.

Mr. Sawyer: All right, sir.

By Mr. Sawyer:

Q. As the result of your consideration of that question, Mr. Schempp, what did you decide to do?

A. We decided the children should not have to pay the penalty of being labelled "odd balls."

[fol. 553] Mr. Rhoads: I object and ask that the answer be stricken out as totally irresponsible.

Mr. Sawyer: I will accede to that.

Judge Biggs: Let the answer be stricken out.

Not your conclusion; just what you decided not to do or to do, Mr. Schempp.

The Witness: We decided the children would stay in class.

By Mr. Sawyer:

Q. I will put the question that Mr. Rhoads may wish to object to.

Would you tell the Court, Mr. Schempp, the reasons that entered into that decision on your part?

Mr. Rhoads: That is objected to, sir. The witness has not even yet answered the specific question as to whether or not he requested a written excuse pursuant to the terms of the Act of 1959.

Mr. Sawyer: He did. He said he decided to let the children stay.

Mr. Rhoads: He decided to let them stay in school but he has not yet answered the question whether he did or did not request that they be excused.

Judge Kirkpatrick: He said stay in class, as I understood him. That is a little different from staying in school. [fol. 554] Didn't he say that?

Mr. Sawyer: It is easier to ask him and clear it up, to be frank about it.

Judge Kraft: I was going to suggest that.

By Mr. Sawyer:

Q. Did you or did you not request the children be excused from class?

A. We did not make that request.

Q. Now, the question then, to rephrase it, now pending, to which there is objection—

Judge Biggs: Don't answer it until we hear the objection.

By Mr. Sawyer:

Q. Mr. Schempp, what reasons entered into your decision with respect to deciding not to ask for your children to be excused from the Bible reading ceremony?

Mr. Rhoads: I object to that question, sir.  
 Judge Biggs: The objection is overruled.

By Mr. Sawyer:

Q. Will you proceed, Mr. Schempp, with your reasons.

A. We originally objected to our children being exposed to the reading of the King James version of the Bible, which we felt was against our particular family religious beliefs, [fol. 555] and under those conditions we would have theoretically liked to have had the children excused. But we felt that the penalty of having our children labelled as "odd balls" before their teachers and classmates every day in the year was even less satisfactory than the other problem.

There were a number of things that we considered at the time.

The children, the classmates of Roger and Donna are very liable to label and lump all particular religious difference or religious objections as atheism, particularly, today the word "atheism" is so often tied to atheistic communism, and atheism has very bad connotations in the minds of children and many adults today. They consider Johnny as an atheist, therefore, he is un-American, he is anti-Red, he is immoral and other things.

Mr. Rhoads: If Your Honor please, I renew my objection to this type of argumentative and dispositive answer.

Judge Biggs: I think probably the point is conveyed that you desire to make, Mr. Sawyer.

Mr. Sawyer: Your Honor—

Judge Biggs: This is really a dissertation rather than testimony.

[fol. 556] Mr. Sawyer: I think in the McCollum case Mrs. Vashti McCollum at some length went into her—

Judge Biggs: Do you think this witness is competent to testify as he is now testifying?

Mr. Sawyer: Yes. I think as a parent, he is, sir.

Judge Kraft: I don't agree, Mr. Sawyer. There is a distinction.

You asked him what were his reasons for action or inaction. He began to tell you what they were, then he went off that track and began to testify to things he considered.



Whether those things that he considered were reasons for his action or inaction don't appear from his present answer. He may have considered a thousand things but acted for only two of the things for the reasons embodied in only two of a thousand things he considered.

I think the view of all of us is that you are entitled to have him testify to the reasons that impelled him to his action or inaction, but not to a description at length of all things that passed through his mind which played no part as reasons in his final conduct.

Mr. Sawyer: Your Honor, my thought was, of course, there would obviously have to be a limit in time alone and [fol. 557] this would be brief. My thought is that a reason standing alone is, or, put it a different way, a reason I suppose is inexorable from the factual assumption upon which the reason is based. And I think that that was really what he was doing at the very end here.

I think that perhaps that chain has been covered but I hope that the Court doesn't mean by its ruling that he can't further give any more of his reasons.

Judge Biggs: I think we will have to pass upon these questions as they are presented, Mr. Sawyer.

I think on this particular line he has gone as far as he should be permitted to go.

Mr. Sawyer: All right, sir.

By Mr. Sawyer:

Q. Mr. Schempp, were there any other reasons or considerations which impelled your decision which you have told us about?

A. There are the mechanics of being excused in school. If I may, it will only take a few minutes to say how this Bible reading is done.

Mr. Rhoads: If Your Honors please, I here again object. This witness is now testifying to practices in Abington High School not from his own knowledge, merely from his own interpretation of what must be the fact because of the new [fol. 558] Act.

Judge Kirkpatrick: That simply goes to the validity of his reason. He is giving his reason. Now, if it is based on

an assumption that isn't correct, that is a matter that can be shown later on. But all he is doing is saying what moved him.

Mr. Rhoads: But it seems to me, sir, to permit this witness to testify to assumptions based upon his interpretations of practices, without those practices being other than is presently in the record, it seems to me we are permitting a latitude here. However—

Judge Kirkpatrick: How can he give a reason— Suppose his actual reason was that he inquired and understood that they made the boy stand in the corner if he elected to walk out?

It is his reason just the same.

Mr. Rhoads: I have registered my objection, sir.

Judge Biggs: Will you answer the question, please?

Mr. Sawyer: Do you wish the stenographer to read you the beginning of your answer?

Judge Biggs: Read it back.

(The reporter read the record, as follows:)

[fol. 559] "A. There are the mechanics of being excused in school. If I may, it will only take a few minutes to say how this Bible reading is done."

The Witness: The children report at 8:15, just a minute or two afterwards the Bible reading begins with the children seated at attention. Then they stand and the Lord's Prayer—

By Judge Biggs:

Q: Did you say the children seated at attention?

A. During the Bible reading, yes, which is over the P.A. system at this particular time. Then the children stand and with the P.A. system leading them they repeat the Lord's Prayer; with no gap, still standing, they then give the flag salute, then they sit down and the announcements, which are very important to a child, immediately follow this. There is no gap in between where the child might come in or go out of the class without considerable trouble or time involved. And we felt that these, any—

Q. When you say "we"—speak for yourself. You felt.

A. I felt, that's right, my wife and myself felt, in considering it with my oldest son Ellory and my other children; that the experimenting that would be required to make these excuses from school would be very detrimental to the psychological well-being of our children.

[fol. 560] This is the mechanical part of it we are objecting to.

Q. Let me get the mechanical part straight. You say the children come to school when?

A. At 8:15 they report.

Q. And when does the school bell ring or start the daily session of the school?

A. That is the time, at 8:15.

Q. And then you say they sit behind their desks, did you say at attention?

A. At attention.

Q. And then what is the first thing?

A. Bible reading starts.

Q. Over the loudspeaker system?

A. Over the loudspeaker system; that's right.

Q. And that lasts for how long?

A. Long enough to read the ten verses of the Bible.

Q. And then when do they stand up?

A. And then they stand up immediately at the end of this.

Q. At the end of that they stand up. And then the Lord's Prayer is recited?

A. Recited with the P.A. system-leading.

Q. And then comes the salute to the flag?

A. While they are still standing.

[fol. 561] Q. And then they sit down again?

A. That's right.

Q. And then the day's announcements are read over the loudspeaker?

A. That's right.

Q. And that concludes—

A. That concludes the Home Room period, they call it. Although this is not always true. Sometimes—

Q. No, let's leave that alone for the time being.

Then after that ordinarily then they go to their respective classrooms?

A. The first class of the day, that's right.

**Q.** The first class of the day?

**A.** Yes. But this is not always followed. There are times when the announcements are made first because of some classes participating in special assemblies. You cannot say that they couldn't, our children could not stay in a room and say they would take their stop watch out and start at 8:20 and say now the Bible reading is over because it just varies on different days, and the announcements are read first followed by the Bible reading which may start at 8:20 or 8:25 even.

**By Mr. Sawyer:**

**Q.** Mr. Schempp, how could your children be excused from [fol. 562] the Bible reading and the Lord's Prayer without also being excused from the announcements and the salute to the flag?

**Mr. Rhoads:** That is objected to, sir. That seems to me to be a question that could be worked out through the administrative facets of the school system and I don't think this witness is in a position to testify.

**Judge Biggs:** We sustain the objection.

**By Mr. Sawyer:**

**Q.** Mr. Schempp, are you familiar with any various modes of punishment which may from time to time be used in the Abington High School?

**A.** In Abington and in other schools which our children have attended in Abington High School, one of the penalties, common penalty, is that bad boys stand in the hall during classes. We felt that this was a reason to be considered, that they would have the stigma of being—this is a form of punishment.

**Mr. Sawyer:** Cross-examine.

Cross examination.

By Mr. Rhoads:

Q. Mr. Schempp, have you ever heard of any child of the Abington School District being placed in a standing position outside of the schoolroom for not listening to Bible reading, for not listening or attending Bible reading? I [fol. 563] would prefer to say attending Bible reading.

A. No.

Q. Mr. Schempp, when did you last attend the opening exercises of any of the schools of Abington School District?

A. I have not attended them, sir.

Q. You have testified before in this case, have you not?

A. That is right.

Q. Have you attended any school session of Abington School District since last testifying in this case?

A. I have not.

Q. So that everything you have testified to here regarding the Abington School District practices of Bible reading and prayer saying is based upon hearsay given to you by someone else; is that correct?

A. By my children.

Q. By your children. And your children have testified in this case before, have they not?

A. That is right.

Q. Since the passage of the Act of 1959, with which you are familiar, the new Act I will call it, regarding Bible reading, have you conferred with the Superintendent of Schools in Abington Township about it?

A. I have not for the reasons I gave previously.

Q. Have you discussed with any administrative officer of [fol. 564] the School District of Abington Township methods by which excuses from Bible reading may be given to the parents or the guardians of children?

A. Parents or guardians of our children?

Q. Parents or guardians of children.

A. No, I have not discussed the problem at all with them.

Mr. Rhoads: No further questions, sir.

If Your Honors please, may I just protect the record by moving to strike the testimony of Mr. Schempp for the reasons which I have heretofore suggested to Your Honors.

Judge Biggs: We assume that Mr. Sawyer will follow this with some testimony which will take a portion of what this witness has said out of the class of hearsay evidence.

Mr. Sawyer: I wasn't going to.

Judge Biggs: If he doesn't follow that it will, of course, have to be stricken.

Mr. Sawyer: Do I understand Mr. Rhoads is pressing the hearsay objection or the objection that he previously made?

Mr. Rhoads: I am pressing all objections which I made as a matter of record, sir.

Mr. Sawyer: Well, he didn't make a hearsay objection.

[fol. 565] Judge Biggs: The Court's ruling is the motion will be taken under consideration; if necessary, we will act upon it and strike such portions of it as we deem necessary.

Mr. Sawyer: Roger Schempp.

ROGER WADE SCHEMP, having been duly sworn, was examined and testified as follows:

#### Direct examination.

By Mr. Sawyer:

Q. Now, you are Roger Schempp, not Ellory?

A. That's right.

Q. Because you are as big as Ellory was when we were here last time.

Roger, where do you go to school?

A. Abington Senior High School.

Judge Biggs: May the Court remark that this is one of the most remarkable growths the Court has seen I think in 40 years.

Mr. Sawyer: I want to remind the Court that there was a case once called Jarndyce v. Jarndyce.

Judge Biggs: Well, we hope we will not have grandchildren here.



By Mr. Sawyer:

Q. Roger, what class are you in?

[fol. 566] A. I am in Junior class at the moment.

Q. You were here present in the courtroom just a moment ago and I take it that you heard your father testify and describe the routine that was followed each morning in Abington Township High School?

A. Yes, I did.

Judge Biggs: Keep your voice up, please, Roger.

The Witness: Yes, sir.

By Mr. Sawyer:

Q. Have you been present in class during those events in the morning?

A. Yes, I have.

Q. And did your father correctly describe the routine that was followed?

A. Yes, he did.

Mr. Sawyer: Cross-examine.

Mr. Rhoads: No questions.

Mr. Sawyer: Thank you very much.

#### MOTION TO STRIKE TESTIMONY AND COLLOQUY THEREON

Mr. Sawyer: Your Honor, with that the plaintiff rests upon the testimony previously offered in this case, which is of record, and the testimony offered today.

Mr. Rhoads: If Your Honors please, I now formally move to strike all of the testimony of the plaintiff in this case [fol. 567] which was offered during the trial of the case pertaining to the former Act which has been superseded by the Acts of 1959. I refer specifically to the testimony in this case of Ellory Schempp, of Donna, of Roger, taken at the dates indicated by the docket in this case regarding the Bible reading under the Act of 1949 which has now been superseded by the Act of 1959.

I also move that the testimony of Dr. Grayzel, heretofore taken in this case on behalf of the plaintiff, be stricken from the record as pertaining to a cause of action unrelated

to the present cause of action which involves the constitutionality of a new Act of Assembly relative to the voluntary reading of ten verses of the Holy Bible without comment and providing for means, for an excuse of children from attendance at those ceremonies.

Mr. Sawyer: May I just say a word on that, Your Honor?

Judge Biggs: Just a moment.

Mr. Sawyer: I didn't know whether you were conferring or waiting for me, sir. I am sorry.

Judge Biggs: We will hear you, Mr. Sawyer, now.

Mr. Sawyer: Your Honor, it seems to me that Your Honors have decided this. This is merely the same mootness [fol. 568] argument on which we had numerous arguments.

Judge Biggs: Is this the same? What is there to show, for example, here in the record that the Bible reading today or yesterday was the same under the new Act that it was under the old?

Mr. Sawyer: Well, Your Honor, it seemed to me that unless there is some evidence to show that it is changed—Mr. Schempp spoke of the practice continuing and Roger confirmed what he said.

Judge Biggs: I didn't so understand his testimony. He spoke of Bible reading.

Mr. Sawyer: Yes.

Judge Biggs: He said the "Bible reading." Now, what was he referring to?

Mr. Sawyer: Your Honor, it seems to me that you have this situation procedurally. Your Honors' injunction forbidding it at the application of the defendants was stayed. It would appear that the defendants wish to continue, at least they so represented by such an application; the practice that they had done prior to this Court's injunction, and that was stayed pending appeal, and that stay is still continuing because it has never been lifted. And the practice, unless the defense comes forward and tells us that it is different, continues.

[fol. 569] Judge Kraft: What is there which creates the presumption of the continuity of anything of that sort?

Mr. Sawyer: Well, Your Honor, the statute is after all what is attacked here and we, I suppose, could attack the statute and show that on any occasion ever our people had been harmed by it and that would be sufficient unless there were evidence that for some reasons they weren't doing it.

Now, I don't see how they could not do it. The statute directs them to do it. The statute, Mr. Rhoads, always we have this argument, he said it is a voluntary Bible reading statute. It is not voluntary at all. It says, "shall," mandated by the Legislature, "it shall be read."

Judge Biggs: Quite aside of whether or not the statute is on the books, you need more than that to sustain the charge of unconstitutionality here. You have to show some sort of action under the statute, don't you?

Mr. Sawyer: Yes, sir. No question about it; to have the standing you do, yes, sir.

Judge Biggs: What is the action here that you complain of?

Mr. Sawyer: Exactly what the complaint alleges. Your Honor, and the answer admits, that ten verses of the King [fol. 570] James version of the Bible are read daily in the schools of Abington Township.

Judge Biggs: Now, will you show me where the answer admits it?

Mr. Sawyer: Yes, sir. Why, I believe—

Judge Biggs: Are you going back to the original answer, Mr. Sawyer?

Mr. Sawyer: No, sir.

Judge Biggs: Is this the original answer?

Mr. Sawyer: No, sir. This is the answer we now have before us.

Judge Biggs: It is the answer to the supplemental pleading.

Mr. Sawyer: The supplemental pleading.

Judge Biggs: First of all, what does the supplemental pleading aver in that respect?

Mr. Sawyer: Excuse me!

Judge Biggs: What does the supplemental pleading aver?

Mr. Sawyer: It avers, Your Honor, it is exactly the same as the original complaint, that ten verses of the Holy

Bible are read each morning, and the answer in Paragraph 9 says inter alia—

[fol. 571] Judge Biggs: Denied except that the defendants admit—

Mr. Sawyer: Yes, sir.

Judge Biggs: What is the allegation of 9?

Mr. Sawyer: Of 9?

Judge Biggs: Yes.

Mr. Sawyer: That it is read, Your Honor.

Judge Biggs: No, not the original, the supplemental complaint.

Mr. Sawyer: Yes, sir. But the supplemental complaint, you see, was one which merely changed the paragraph to be changed, so it is the original—

Mr. Rhoads: I think I have here for Your Honors—Mr. Sawyer, maybe I can help you here—9 is, the response is as follows—

Judge Biggs: I have the response; I wanted the allegation.

Mr. Sawyer: 10 verses of the King James version of the Holy Bible, either the old or new Testament thereof, are read by a student over a public address system which is broadcast into all the classrooms.

That is 9A.

9B, Your Honor, is:

[fol. 572] Immediately thereafter the students in the entire school—and this says “including Ellory Frank Schempp,” but there is a corresponding one for each child—are directed over the said public address system to rise and say the Lord’s Prayer.

That paragraph, Your Honor, is in both the original and amended and supplemental pleading.

Judge Biggs: All right. Now we come to the answer, and you are reading from page 2.

Mr. Sawyer: Yes, sir.

Judge Biggs: And 9.

Mr. Sawyer: Yes, sir.

Judge Biggs: “Denied,” it says, “except the defendants admit that in the Abington Senior High School prior to commencement of classes—”

In what way does the answer differ from the allegation of the amended complaint?

Mr. Sawyer: I don't see that it does, Your Honor. It is a denial but the admission which is for our purposes I think right here at this moment critical is that they are reading the Bible, ten verses of the Holy Bible, without comment.

The words "without comment" appears to be a difference, Your Honor, for one thing.

[fol. 573] Judge Biggs: Just a moment, please.

The Court will reserve judgment on your motion. We will reserve decision on your motion at the present time.

Mr. Rhoads, is there any evidence that you desire to offer?

Mr. Rhoads: May I make one further objection, sir?

I would like to include in my motion something which inadvertently I omitted, mainly, a motion to strike the testimony of Edward Lewis Schempp, father, at the prior hearing in this case. In other words, I included, I think, Roger, Donna and Ellory as well as Grayzel, and I hope Your Honors will permit me to include the name of Edward Lewis Schempp in the old hearing.

Judge Biggs: We understand your motion to be so amended.

Mr. Rhoads: Yes. And, secondly, may I merely correct as a matter of record Mr. Sawyer's, I think, inadvertent statement when he indicated in his argument to Your Honors that there had been a stay in this situation.

I think Your Honors will recall that the action of the Supreme Court involved a vacation of the original judgment in this case and a remand to Your Honors for such further proceedings as Your Honors might deem necessary.

[fol. 574] Judge Biggs: I think what Mr. Sawyer was referring to was the stay granted by this Court.

We did grant a stay, didn't we?

Mr. Rhoads: Exactly. But I think then he said that there is presently a stay in effect. That is what I understood him to say, as being an argument why no further testimony need be taken. I so interpreted it but I think Your Honors recall that the judgment ultimately was vacated.

Mr. Sawyer: Your Honor, I would like to add to the record one paragraph of the answer of the intervenor-defendant, he being the Superintendent of Public Instruction, which Your Honors will recall was permitted to intervene as actually a party defendant in the action.

Judge Biggs: Who was?

Mr. Sawyer: The Superintendent of Public Instruction.

Judge Biggs: Yes, he was permitted, as I remember, to actually intervene. I think we made an order, did we not?

Mr. Rhoads: He is a defendant, sir.

Mr. Sawyer: He is now a defendant.

Judge Biggs: Yes.

Mr. Sawyer: And, therefore, in accordance with that, he very properly answered the supplemental pleading.

[fol. 575] Judge Biggs: Yes, I have his answer here.

Mr. Sawyer: Paragraph 9, you will note, Your Honor—

Judge Biggs: That is Mr. Boehm.

Mr. Sawyer: That's right.

Well, I shall not read it, you have it, it is part of the record, except to point out that there again he says that it is read, and that along with the flag salute, making various school announcements over the public address system.

Judge Biggs: What do counsel understand with respect—I wish you would instruct me, an Appeals Court judge—with respect to pleadings in Pennsylvania in the Federal Court? I have always understood from my practice or knowledge of the Delaware and New Jersey pleadings that well-pleaded and admitted allegations were admissions; that you didn't have to put your pleading in evidence, so to speak, by reading it.

Mr. Sawyer: I think not.

Mr. Rhoads: I certainly would never raise that question before Your Honors in a proceeding of this kind. But I do suggest to Your Honors that Paragraph 9 of the answer to the supplemental pleading is, first, a denial, and that is a denial of the specific averments made by complainant; but [fol. 576] then we say except that certain things are being done. And, of course, we admit that the Holy Bible is currently being read at the Abington schools, but Your Honors will see that the very gravamen of this issue, which is the



effect of excuse provisions in the Act, is preserved in the last sentence of Paragraph 9 of our answer, where we say, "And defendants further admit that immediately after such Bible reading the students in the classroom, excepting those who have been excused because they do not desire to listen to such Bible reading, rise and may, if they so desire, say the Lord's Prayer."

"That is the answer that we have filed in this case, and I certainly think, sir, that if there is any proof it is to be forthcoming, as to a constitutional injury or an injury coming within the purview of unconstitutionality on the part of any of these plaintiffs by virtue of the impact of this new Act, it is up to them to say so and to prove it. And I suggest very emphatically to Your Honors as this record now stands, they have not established any such impairment of any constitutional rights.

Judge Kraft: I understand from something you said a moment ago, Mr. Rhoads, that counsel agree that whatever facts are pleaded in the supplemental pleading and admitted [fol. 577] by the answer may be so taken by the Court.

Mr. Rhoads: I would have no objection to that, sir, because I think it would be unfair to Your Honors for me to take any such position.

And I take it, sir, that that particular observation, Judge Kraft, did apply to the question, because I would like to get my thinking correct, of the fact of the continuance of Bible reading. There is no question that the Bible reading is continued and has been continued in Abington School District.

Judge Biggs: In the same fashion as before.

Mr. Rhoads: The same general fashion with which we are familiar. I don't, of course, agree to the observations made by Mr. Schempp, but if the fact of the Bible reading is a material fact here, which obviously it is, it is being read, sir. There is no question. And I take it that that is the impact of Your Honor's request to me.

Of course, the same thing would apply to my exception which provides for those who had been excused.

Judge Biggs: I think we understand the position here.

Mr. Rhoads: Thank you, sir.

Judge Biggs: Have you any evidence to offer?

Mr. Rhoads: I have no further evidence and I stand [fol. 578] on the record with my motion before Your Honors, and Your Honors have reserved, I believe, judgment on my motion.

Judge Biggs: Yes.

[fol. 590]

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA  
Civil Action No. 24119

EDWARD L. SCHEMP, et al.

v.

SCHOOL DISTRICT OF ABINGTON TOWNSHIP, et al.

OPINION OF THE COURT—February 1, 1962

By Biggs, *Circuit Judge*.

- For a full understanding of the problems presented by this case it will be necessary to read our earlier opinions at D.C. 1959, 177 F. Supp. 398; D.C. 1959, 184 F. Supp. 381; and D.C. 1961, 195 F. Supp. 518. To recapitulate events briefly we state that the suit at bar was brought on February 14, 1958, by Edward and Sidney Schempp as parents and natural guardians of the minor plaintiffs, Ellory, Roger and Donna, all residents of Abington Township, Pennsylvania, against the School District of Abington Township, against the Principal of the Abington Senior High School and the Principal of the Huntingdon Junior High School, in Abington Township. The purpose of the suit was to have this court declare unconstitutional Section 1516 of the Pennsylvania Public School Act of March 10, 1949, as it then existed, 24 P.S. § 15-1516. Section 1516 provided for the compulsory reading of ten verses of the "Holy Bible" at the opening of each public school in the Commonwealth of Pennsylvania on each school day by teachers or

by students and prescribed a specific penalty to be imposed on a teacher in case of failure to obey the mandate of the statute.

The Schempps, who are Unitarians, objected to the Bible reading pursuant to the statute on the grounds, among [fol. 591] others, that this constituted an establishment of religion and prohibited the free exercise of religion in violation of the First Amendment. We agreed with these contentions and on September 17, 1959, entered a judgment declaring the statute unconstitutional and enjoined its enforcement. See D.C. 1959, 177 F. Supp. 398. The defendants appealed to the Supreme Court of the United States. Thereafter Act No. 700 was passed by the General Assembly of Pennsylvania and became effective on December 17, 1959. Thereby the Act of March 10, 1949 was amended. The amending Act provides as follows: "At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian." See 24 P.S. § 15-1516 (Supp. 1961). Following the enactment of this amendment and certain steps which need not be set out here, the Supreme Court on October 24, 1960, handed down a *per curiam* opinion and order, 364 U.S. 298, vacating our judgment and remanding the case for such further proceedings as might be appropriate in the light of the amending statute.

On January 4, 1961, the plaintiffs moved for leave to file a supplemental pleading under Rule 15(d), Fed. R. Civ. Proc., 28 U.S.C. The supplemental pleading, really a supplemental complaint, provides only for the substitution in the original complaint of the new citation and text of the amended statute in place of the citation and text of the statute as it was prior to amendment and the elimination of all the paragraphs in the complaint relating to Elloy Schempp, he having graduated from the Abington Senior High School. The amendments have been allowed and the supplemental pleading has been filed. For a more detailed description of what took place see D.C. 1959, 184 F. Supp. [fol. 592] 381, and D.C. 1961, 195 F. Supp. 518. The Superintendent of Public Instruction of the Commonwealth of

Pennsylvania has been permitted to intervene as a party defendant.

Hearing has been had on the amended pleadings. Evidence has been taken. The case has been fully briefed and argued. It is now ripe for decision.

It is unnecessary to review the evidence taken at the former hearings or to repeat here the findings of fact set out in our first opinion, reported at D.C. 1959, 177 F. Supp. 398 *et seq.* The present Bible reading statute permits a student to be excused from attending Bible reading upon the written request of his parent or guardian. The statute itself contains no specific penalty to be imposed upon the teacher who fails to observe its mandate as was the case prior to the 1959 amendment. The teacher, however, who refuses or fails to obey the mandate of the amended statute may have his contract of employment terminated pursuant to 24 P.S. § 11-1122 (Supp. 1960). This is a provision of the Pennsylvania Public School Act which speaks strongly for itself and is set out in the margin.<sup>1</sup>

The procedure followed in the Abington Senior High School, following the amendment of Section 1516, did differ [fol. 593] somewhat from that which was in effect prior to the amendment. We describe it briefly. The children attending the High School, Roger and Donna included, reported to their "homerooms" at 8:15 A.M. and a few minutes thereafter the Bible reading began with each pupil seated "at attention". The Bible reading consists of reading, without comment, over a loud speaker ten verses of the King James Version of the Bible. Then the children stood and repeated, with the public address system leading them, the Lord's Prayer. Next, still standing, the children gave the Flag Salute. They then sat down. Announcements were

<sup>1</sup> 24 P.S. § 11-1122 (Supp. 1960) provides: "The only valid causes for termination of a contract heretofore or hereafter entered into with a professional employe shall be immorality, incompetency, intemperance, cruelty, persistent negligence, mental derangement, advocacy of or participating in un-American or subversive doctrines, persistent and wilful violation of the school laws of this Commonwealth on the part of the professional employe . . . ." See also Board of Public Education, School District of Philadelphia v. Bernard August, — Pa. —, — A.2d —, (1962).

made and when the announcements were completed the students went to their classrooms for the first classes of the day.

Edward Schempp, the children's father, testified that after careful consideration he had decided that he should not have Roger or Donna excused from attendance at these morning ceremonies. Among his reasons were the following. He said that he thought his children would be "labeled as 'odd balls'" before their teachers and classmates every school day; that children, like Roger's and Donna's classmates, were liable "to lump all particular religious difference[s] or religious objections [together] as 'atheism'" and that today the word "atheism" is often connected with "atheistic communism", and has "very bad" connotations, such as "un-American" or "anti-Red", with overtones of possible immorality. Mr. Schempp pointed out that due to the events of the morning exercises following in rapid succession, the Bible reading, the Lord's Prayer, the Flag Salute, and the announcements, that excusing his children from the Bible reading would mean that probably they [fol. 594] would miss hearing the announcements so important to children. He testified also that if Roger and Donna were excused from Bible reading they would have to stand in the hall outside their "homeroom" and that this carried with it the imputation of punishment for bad conduct.

The plaintiffs seek to enjoin the enforcement of Section 1516 as now amended and to have it and the practices carried on pursuant to it at the Abington Senior High School declared unconstitutional as an establishment of religion and as an interference with the free exercise of religion. The defendants maintain, among other things, that the plaintiffs have failed to prove that they have sustained any injury to a constitutionally protected right and that therefore they are without standing to maintain the suit at bar. The defendants insist that it follows that this court is without jurisdiction to determine whether the statute or the exercises conducted under it are constitutional. They contend also that the statute does not establish a religion and that it does not interfere with the free exercise of religion.

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\* The word used by Mr. Schempp was "anti-Red". We assume that he meant to use the word "pro-Red."

and vigorously assert that the doctrine of abstention requires this court to stay its hand.

As to the preliminary questions of law we think we need not say much more than that which is set out under heading "III" of our first opinion, 177 F. Supp. 402-403, except in two respects. The statute now *sub judice* provides, as has been said, that a child may be excused from attendance at the Bible reading on the written request of his parent or guardian. But since, as will appear hereinafter, we decide this controversy on the "Establishment of Religion" clause of the First Amendment the exculpatory phrase cannot aid the defendants' argument that the doctrine of abstention is applicable for, as we will show, there is no [fol. 593] religious establishment in this case whether pupils are or are not excused from attendance at the morning exercises. It is also true, as the defendants point out, that Section 1516 as amended by the Act of 1959, has not been long in existence, but this cannot be considered to be a decisive factor. There is no suggestion or even hint that the important issues presented by this case will be litigated in the Pennsylvania Courts. We have no doubt that substantial federal questions are presented for adjudication by the present litigation. We therefore must proceed to decide this controversy on the merits.

The attendance by the minor plaintiffs, Roger and Donna Schempp, at the Abington Senior High School is compulsory. See 24 P.S. § 13-1327 (Supp. 1960). The reading of ten verses of the Holy Bible<sup>3</sup> under the present statute also is compelled by law. The reading of the verses, even without comment, possesses a devotional and religious character and constitutes in effect a religious observance. The devotional and religious nature of the morning exercises is made all the more apparent by the fact that the Bible reading is followed immediately by a recital in unison by the pupils of the Lord's Prayer. The fact that some pupils, or theoretically all pupils, might be excused from attendance at the exercises does not mitigate the obligatory nature of the ceremony for the "new" Section 1516, as did the statute prior to its 1959 amendment, unequivocally requires the

<sup>3</sup> The Bible employed was the King James Version. See note 10 cited to the text of our first opinion, 177 F. Supp. at p. 400.



exercises to be held every school day in every school in the Commonwealth. The exercises are held in the school building [fol. 596] and performed are conducted by and under the authority of the local school authorities and during school sessions. Since the statute requires the reading of the "Holy Bible", a Christian document, the practice, as we said in our first opinion, prefers the Christian religion. The record demonstrates that it was the intention of the General Assembly of the Commonwealth of Pennsylvania to introduce a religious ceremony into the public schools of the Commonwealth.

The case at bar is governed by *McCullum v. Board of Education*, 333 U.S. 203 (1948). Its essential facts and those of *McCullum* are quite similar. They need not be compared here. As was said by Mr. Justice Black in *McCullum*, at p. 212: "[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. . . . [T]he First Amendment has erected a wall between Church and State which must be kept high and impregnable." In *Zorach v. Clauson*, 343 U.S. 306, 315 (1952), Mr. Justice Douglas stated: "We follow the *McCullum* case," and this was reiterated in *Torcaso v. Watkins*, 367 U.S. 488, 494 (1961). In *Torcaso* Mr. Justice Rutledge's dissenting opinion in *Everson v. Board of Education* 330 U.S. 1, 59 (1947), was quoted with approval: "[W]e have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion. Remonstrance, Pa. 8, 12." The Commonwealth of Pennsylvania has seen fit to breach the wall between church and state.

We hold the statute amended unconstitutional on the ground that it violates the "Establishment of Religion" clause of the First Amendment made applicable to the Commonwealth of Pennsylvania by the Fourteenth Amendment. We find it unnecessary to pass upon any other contention made by the plaintiffs in respect to the unconstitutionality of the statute or of the practices thereunder.

[fol. 597] We reiterate the findings of fact made in our first opinion, handed down on September 16, 1959, as

amended September 22, 1959, except those contained therein which are inconsistent with the findings specifically made in this opinion. In addition to the findings of fact in our prior opinion and in this opinion we make the following additional findings of fact and conclusions of law. Rule 52 F. R. Civ. Proc., 28 U.S.C.

#### FINDINGS OF FACT

1. Plaintiffs Edward Louis Schempp and Sidney Gerber Schempp are the parents and natural guardians of minor plaintiffs Roger Wade Schempp and Donna Kay Schempp, residing in Montgomery County, Pennsylvania.
2. All of the defendants reside or are located within the jurisdiction of the United States District Court for the Eastern District of Pennsylvania.
3. Minor plaintiffs Roger Schempp and Donna Schempp are presently eleventh grade students in the Abington Senior High School, Abington Township, Montgomery County, Pennsylvania.
4. At the school attended by the minor plaintiffs there is an opening period each day observed by the reading of ten verses of the Bible.
5. The reading of the Bible each day is followed by a standing recitation in unison of that portion of the New Testament known as the Lord's Prayer.
6. The attendance of each student at the ceremony of the Bible reading is compulsory unless the student produces a written excuse from his or her parent or guardian.
7. The practice of the daily reading of ten verses of the Bible in the public schools of Abington Township constitutes religious instruction and the promotion of religiousness.
- [fol. 598] 8. The practice of the daily reading of ten verses of the Bible together with the daily recitation of the Lord's Prayer in the public schools of Abington Township is a religious ceremony.

### CONCLUSIONS OF LAW

1. The court has jurisdiction of the parties and the subject matter of this litigation under Sections 1343, 2281, Title 28, United States Code. The instant three-judge court was properly convened pursuant to Section 2284, Title 28, United States Code, and has before it substantial federal questions for adjudication.

2. The practice of reading ten verses of the Bible each day in the public schools of Abington Township is pursuant to the mandatory provisions of Section 1516 of the Pennsylvania Public School Code of March 10, 1949, as amended.

3. Section 1516 of the Pennsylvania Public School Code of March 10, 1949, as amended, violates the First Amendment to the United States Constitution as applied to the states by the Fourteenth Amendment in that it provides for an establishment of religion.

4. The combined practice of Bible reading and mass recitation of the Lord's Prayer by students in the public schools of Abington Township violates the First Amendment to the United States Constitution as applied to the states by the Fourteenth Amendment in that said practice provides for an establishment of religion.

[fol. 599] The motion of the defendants to strike out the plaintiffs' testimony taken at the hearings in this case, prior to the amendment of Section 1516 in 1959, on the ground that the supplemental pleading states a new cause of action will be denied.

The motion of the defendants to dismiss the supplemental pleading on the ground that it fails to state a cause of action will be denied.

John Biggs, Jr., United States Circuit Judge, William H. Kirkpatrick, C. William Kraft, Jr., United States District Judges.

Dated: February 1, 1962.

[fol. 600]

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA  
Civil Action No. 24119

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EDWARD L. SCHEMP, et al.

v.

SCHOOL DISTRICT OF ABINGTON TOWNSHIP, et al.

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FINAL DECREE—February 1, 1962

The plaintiffs having filed their complaint on February 14, 1958, and having amended their complaint by authority of the court by way of a supplemental pleading filed January 4, 1961, and answers having been duly filed, and a three-judge court having been convened pursuant to Section 2284, Title 28, United States Code, and hearings having been held and testimony taken by the court, and briefs having been filed and argument having been heard, now therefore it is

Ordered, Adjudged and Decreed as follows:

1. The defendants are perpetually enjoined and restrained from reading and causing to be read, or permitting anyone subject to their control and direction to read, to students in the Abington Senior High School, Abington Township, Montgomery County, Pennsylvania, any work or book known as the Holy Bible, as directed by Section 1516 of the Pennsylvania Public School Code of March 10, 1949, P. L. 30, as amended, in conjunction with, or not in conjunction with, the saying, the reciting, or the reading of the Lord's Prayer; provided, that nothing herein shall be construed as interfering with or prohibiting the use of any books or works as educational, source, or reference material;

2. The defendants' motion to strike out the plaintiffs' testimony taken at the hearings in this case prior to the amendment of Section 1516 in 1959 is denied;

[fol. 601] 3. The defendants' motion to dismiss the plaintiffs' supplemental pleading on the ground that it fails to state a cause of action is denied.

John Biggs, Jr., United States Circuit Judge, William H. Kirkpatrick, C. William Kraft, Jr., United States District Judges.

Dated: February 1, 1962.

[fol. 605]

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE  
UNITED STATES—Filed March 28, 1962

1. Notice is hereby given that School District of Abington Township, Pennsylvania, James F. Kochler, O. H. English, Eugene Stull, M. Edward Northam and Charles H. Boehm, Superintendent of Public Instruction, Commonwealth of Pennsylvania, the defendants above named, hereby appeal to the Supreme Court of the United States from the Final Decree perpetually enjoining and restraining defendants from reading and causing to be read, or permitting anyone subject to their control and direction to read, to students in the Abington Senior High School, [fol. 606] Abington Township, Montgomery County, Pennsylvania, any work or book known as the Holy Bible, as directed by Section 1516 of the Pennsylvania Public School Code of March 10, 1949, P. L. 30, as amended, in conjunction with, or not in conjunction with, the saying, the reciting, or the reading of the Lord's Prayer, which Final Decree, dated February 1, 1962, was filed in this action on February 1, 1962.

This appeal is taken pursuant to 28 U.S.C. §1253.

H. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

- (1) Complaint filed February 14, 1958.
- (2) Answer of Defendants, filed April 25, 1958.
- (3) Transcript of trial held August 5-6, 1958, November 25, 1958, March 12, 1959, including the following Exhibits offered thereat: P-1, D-3, D-4, D-9, D-10, D-11, and including Exhibit D-1 admitted into evidence by stipulation of counsel, dated December 15, 1958.
- (4) Transcript of deposition of Charles H. Boehm held November 26, 1958, including Exhibit D-9a offered thereat.
- (5) Plaintiffs' Request for Findings of Fact and Conclusions of Law, filed March 26, 1959.
- (6) Defendants' Request for Findings of Fact and Conclusions of Law, filed April 1, 1959.
- [fol. 607] (7) Opinion of the Court dated September 16, 1959.
- (8) Final Decree of the Court dated September 16, 1959, and filed September 17, 1959.
- (9) Defendants' Motion to Stay Final Judgment Pending Appeal, filed September 21, 1959.
- (10) Order of Honorable John Biggs, Jr., staying operation and enforcement of the Final Decree, filed September 21, 1959.
- (11) Order of Honorable John Biggs, Jr., amending Opinion of the Court, filed September 22, 1959.
- (12) Notice of Appeal to the Supreme Court of the United States, dated November 12, 1959.



(13) Defendants' Motion for Relief from Judgment and Final Decree under Rule 60(b), filed December 23, 1959.

(14) Opinion and Order of Honorable John Biggs, Jr., denying Defendants' Motion for Relief from Judgment under Rule 60(b), filed June 9, 1960.

(15) Mandate of the Supreme Court of the United States vacating judgment of the Court with costs and remanding cause for such further proceedings as may be appropriate, filed December 9, 1960.

(16) Plaintiffs' Motion for Leave to File a Supplemental Pleading under Rule 15(d), filed January 4, 1961.

[fol. 608] (17) Motion of Charles H. Boehm, Superintendent of Public Instruction of the Commonwealth of Pennsylvania, to intervene as a defendant, filed January 5, 1961.

(18) Order of Honorable John Biggs, Jr., granting leave to Charles H. Boehm to intervene as a defendant, filed March 7, 1961.

(19) Opinion of the Court and Order granting leave to plaintiffs to file Supplemental Pleading under Rule 15(d) and that same is filed, filed June 22, 1961.

(20) Answer of Defendants, School District of Abington Township, et al., to Plaintiffs' Supplemental Pleading, filed July 10, 1961.

(21) Answer of Defendant Charles H. Boehm to Plaintiffs' Supplemental Pleading, filed July 11, 1961.

(22) Transcript of trial held October 17, 1961.

(23) Defendants' Request for Findings of Fact and Conclusions of Law, filed January 8, 1962.

(24) Opinion of the Court and Final Decree dated February 1, 1962 and filed February 1, 1962.

(25) Defendants' Motion to Stay Final Judgment Pending Appeal, filed February 5, 1962.

(26) Order of the Court staying Final Decree of February 1, 1962, filed February 5, 1962.

(27) Notice of Appeal.

[fol. 609] III. The following questions are presented by this appeal:

(1) Is Section 1516 of the Public School Code of 1949, the Act of March 10, 1949, P. L. 30, as amended by the Act of December 17, 1959, P. L. 1928, a law respecting an establishment of religion or prohibiting the free exercise thereof within the prohibition of the First Amendment to the United States Constitution as applied to the States by the Fourteenth Amendment, by providing for the reading without comment at the opening of each public school on each school day, of at least ten verses from the Holy Bible, subject to the excuse of any child from such Bible reading or attending such Bible reading upon the written request of his parent or guardian?

(2) Have plaintiffs been deprived of any constitutionally protected right when, in the absence of compulsion on them to believe, disbelieve, participate in or attend a Bible reading exercise in violation of their religious consciences, they have not sought to be excused under a statute which provides the right of excuse, and no measurable tax burden upon them resulting from the Bible reading exercise has been shown?

(3) Did the United States District Court abuse its discretion in exercising jurisdiction in this matter for the reason that the Supreme Court of the Commonwealth of Pennsylvania has neither interpreted nor determined, nor has it had the opportunity to interpret or determine the constitutionality of Section 1516 of the Public School Code, *supra*?

C. Brewster Rhoads, 1421 Chestnut Street, Philadelphia 2, Pa.; Percival R. Rieder, 1067 Old York Road, Abington, Pa.; Attorneys for School District of Abington Township, Pennsylvania, James F. Koehler, O. H. English, Eugene Stull and M. Edward Northam.

John D. Killian, III, Deputy Attorney General, David Stahl, Attorney General, Attorneys for Charles H. Boehm, Superintendent of Public Instruction, Commonwealth of Pennsylvania.

[fol. 613] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 614]

SUPREME COURT OF THE UNITED STATES

No. 142—October Term, 1962

SCHOOL DISTRICT OF ABINGTON TOWNSHIP,  
PENNSYLVANIA, et al., Appellants,

vs.

EDWARD LEWIS SCHEMPP, et al.

ORDER NOTING PROBABLE JURISDICTION—October 8, 1962

Appeal from the United States District Court for the Eastern District of Pennsylvania.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is set for argument immediately following No. 119.

October 8, 1962

Mr. Justice Goldberg took no part in the consideration or decision of this case.

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## **TRANSCRIPT OF RECORD**

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**Supreme Court of the United States**

**OCTOBER TERM, 1962**

**No. 119**

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**WILLIAM J. MURRAY, III, ETC., ET AL.,  
PETITIONERS,**

**vs.**

**JOHN N. CURLETT, PRESIDENT, ET AL., INDIVIDU-  
ALLY AND CONSTITUTING THE BOARD OF  
SCHOOL COMMISSIONERS OF BALTIMORE CITY.**

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**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS  
OF THE STATE OF MARYLAND**

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**PETITION FOR CERTIORARI FILED MAY 15, 1963**

**CERTIORARI GRANTED OCTOBER 2, 1963**

# SUPREME COURT OF THE UNITED STATES

No. 119

WILLIAM J. MURRAY, III, ETC., ET AL.,  
PETITIONERS,

*vs.*

JOHN N. CURLETT, PRESIDENT, ET AL., INDIVIDU-  
ALLY AND CONSTITUTING THE BOARD OF  
SCHOOL COMMISSIONERS OF BALTIMORE CITY.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS  
OF THE STATE OF MARYLAND

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[fol. A]

**IN THE  
COURT OF APPEALS OF MARYLAND**

September Term, 1961

No. 90

WILLIAM J. MURRAY, III, INFANT, ETC., ET AL., Appellants,

v.

JOHN N. CURLETT, ET AL.,

and

BOARD OF SCHOOL COMMISSIONERS OF BALTIMORE CITY,  
Appellees.

APPEAL FROM THE SUPERIOR COURT OF BALTIMORE CITY

(J. GILBERT PRENDERGAST, Judge)

**Appellants' Appendix—Filed August 5, 1961**

[fol. ii]

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[fol. 1]

IN THE SUPERIOR COURT OF BALTIMORE CITY,  
STATE OF MARYLAND

DOCKET ENTRIES AND JUDGMENT

Dec. 7, 1960—Petition for Writ of Mandamus and Affidavit filed.

Writ of Summons issued.

Jan. 16, 1961—Appearance of Harrison L. Winter, Esq., Ambrose T. Hartman, Esq. and Philip Z. Altfeld, Esq. for defendants. Same day Demurrer to Petition for Writ of Mandamus filed.

Jan. 23, 1961—Petition of Harold Buchman, Esq. to strike his appearance for Plaintiffs and Order of Court granting same filed.

Jan. 31, 1961—Plaintiffs' Request for hearing on Demurrer filed.

Mar. 2, 1961—Demurrer held Sub Curia (Prendergast, Judge).

Apr. 27, 1961—Defendants' Demurrer to Petition for Writ of Mandamus "Sustained" without leave to amend and the Petition "Dismissed" (Prendergast, Judge).

Apr. 27, 1961—Judgment absolute in favor of the defendants for costs of suit.

Apr. 27, 1961—Memorandum Opinion of Court filed.

Apr. 29, 1961—Plaintiffs' Appeal to Court of Appeals filed.

May 9, 1961—Plaintiffs' Appeal to Court of Appeals filed.

IN THE SUPERIOR COURT OF BALTIMORE CITY

PETITION FOR WRIT OF HABEAS CORPUS—Filed December 7, 1960

The Petition of William J. Murray, III, infant, by Madalyn E. Murray, his mother and next friend and Madalyn E. Murray, individually, through Harold Buchman and Leonard J. Kerpelman, their attorneys, respectfully represents unto your Honor:

[fol. 2] 1. William J. Murray, III, fourteen years of age, one of the two Petitioners herein, has been, during the time hereinafter mentioned, and is at the time of the filing herein, a citizen and resident of Baltimore City, State of Maryland, and is a student in the ninth grade at Woodbourne Junior High School, a public school in said City and State.

2. Madalyn E. Murray, Petitioner, is the mother of said William J. Murray, III, and has been, during the time hereinafter mentioned, and is at the time of the filing herein, a citizen, resident and taxpayer of Baltimore City, State of Maryland.

3. The Respondents, hereinabove specified, constitute the Board of School Commissioners of Baltimore City, and by virtue of Article 77, Section 203, of the Annotated Code of Maryland, 1957 Ed., have supervisory power and control over the public schools of Baltimore City, with the power, among other things, to select textbooks for the public schools of said City, "provided such textbooks shall contain nothing of a sectarian or partisan character."

4. From 1905 to the date of filing herein, and at all times hereinafter mentioned, there has been and is now in effect a rule, known as Article VI, Section 6, of the Rules of the Board of School Commissioners of Baltimore City, made applicable to, and imposed upon the pupils attending the public schools of Baltimore City, including the said infant Petitioner herein, under the Compulsory School Attendance Law (Article 77, Section 231, of the Annotated Code of Maryland, 1957 Ed.) and said rule, together with a certain amendment thereto, hereinafter specified, is enforced by

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the Respondents herein to the great damage and detriment of your Petitioners and in violation of their constitutional rights, as more particularly set forth below; and in derogation of said taxpayer's property rights and pecuniary interests; the said rule provides as follows:

Section 6—Opening Exercises. Each school, either collectively or in classes, shall be opened by the reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer. The Douay version may be used [fol. 3] by those pupils who prefer it. Appropriate patriotic exercises should be held as a part of the general opening exercise of the school or class."

5. In response to protest by your Petitioners, the aforesaid rule was amended by the Respondents on November 17, 1960, so as to include the provision that "Any child shall be excused from participating in the opening exercises or from attending the opening exercises upon the written request of his parent or guardian;" and as amended, said rule, containing all the matter quoted in paragraph 4 above, is made applicable to, and imposed upon the pupils in the public schools of Baltimore City, including the infant Petitioner herein.

6. The uniform practice under the aforesaid rule in the public schools of Baltimore City has been to read from the King James version of the Holy Bible and, in fact, the Petitioner, William J. Murtagh III, was, by reason of the rule set forth in paragraph 4 above, required and compelled, contrary to his will and conscience, to attend the reading of the Bible ceremony and to recite the Lord's prayer, which was practiced and performed as an opening exercise on each school day in his class in said Woodbourne Junior High School, until November 17, 1960, when said Petitioner was excused from said exercise at the written request of his mother, in accordance with the amendment to said rule.

7. Your Petitioners are atheists and define their beliefs as follows:

"An atheist loves his fellowman instead of a God.

An atheist believes that heaven is something for which

we should work now, here, on earth, for all men together to enjoy. An atheist believes that he can get no help through prayer, but that he must find in himself the inner conviction and the strength to meet life, to grapple with it, to subdue it, and to enjoy it. An atheist believes that only in a knowledge of himself and his fellow can he find the understanding that will help him to a life of fulfillment. He seeks to know himself and his fellowman rather than to know God. [fol. 4] An atheist believes that a hospital should be built instead of a church. An atheist believes that a deed must be done instead of a prayer said. An atheist strives for involvement in life and not escape into death. He wants disease conquered, poverty banished, war eliminated. He wants man to understand and love man; he wants an ethical way of life. He believes that we cannot rely on God, channel action into prayer, or hope for an end of troubles in a hereafter, that we are our brother's keeper, we are the keepers of our own lives; that we are responsible persons; that the job is here and the time is now."

8. Your Petitioners aver that the Rule of the Board of School Commissioners, hereinabove set forth, makes mandatory the reading of the Holy Bible and/or the Lord's prayer as a sectarian exercise in the public schools of Baltimore City, and thereby contravenes their right to freedom of religion under the First and Fourteenth Amendments of the United States Constitution, and violates the principle of separation between church and state, contained therein; they further aver that said Rule is contrary to, and violates Article 77, Section 203, of the Annotated Code of Maryland, 1957 Ed., which proscribes the selection by Respondents of textbooks of a sectarian or partisan character for the public schools of Baltimore City.

9. More particularly, the Petitioners aver that the said Rule, as practised, violates the said constitutional rights of the Petitioners in that it threatens their religious liberty by placing a premium on belief as against non-belief and subjects their freedom of conscience to the rule of the

majority; it pronounces belief in God as the source of all moral and spiritual values, equating these values with religious values, and thereby renders sinister, alien and suspect the beliefs and ideals of your Petitioners, promoting doubt and question of their morality, good citizenship and good faith.

10. Your Petitioners further aver that the said amendment to the Rule, excusing those from participating in, or [fol. 5] attending the said opening exercises of the class upon request, in no wise negates or mitigates the violation and infringement of their constitutional rights. The effect of said amendment is merely an opportunity for exclusion from a stated school exercise which a majority of the pupils have been taught to revere, and the exercise of which opportunity causes the excluded pupil, to wit: the Petitioner, William J. Murray, III, to lose caste with his fellows, to be regarded with aversion, and to be subjected to reproach and insult. Such practice tends to destroy the equality of the pupils which the Constitution seeks to establish and protect, and to put a portion of the pupils to serious disadvantage in many ways with respect to the others.

11. Your Petitioners further show that they have petitioned and requested the Respondents in their capacity as the Board of School Commissioners of Baltimore City to cease and desist in their application and enforcement of the said Rule, and to direct the teachers in said public schools of Baltimore City to discontinue the unlawful and wrongful practice and exercise above set forth, and to confine the instruction to be given by such teachers to the studies and branches of knowledge of a non-sectarian nature, lawfully provided for said pupils; but that said Respondents, in said capacity, have wholly neglected and refused, and still do wholly neglect and refuse to interfere in said matter, and have and do wholly refuse to perform the duties legally devolving upon them, and have and to now permit said above mentioned exercise to be carried on as above set forth.

7

Wherefore, your Petitioners pray that a Writ of Mandamus may issue from this Court to said Respondents, commanding them to rescind and cancel the aforesaid Rule and to cause said teachers in Baltimore City to discontinue the practice and exercise above set forth.

Leonard J. Kerpelman, Attorney for Petitioners.

[fol. 6]

IN THE SUPERIOR COURT OF BALTIMORE CITY

DEMURRER—Filed January 16, 1961.

Now Come John N. Carlett, President, Samuel Epstein, Mrs. M. Richmond Farring, Eli Frank, Jr., Dr. Roger Howell, Henry P. Ier, Dr. William D. McElroy, Mrs. Elizabeth Murphy Phillips, and John R. Sherwood, individually and constituting The Board of School Commissioners of Baltimore City, Respondents in the above entitled matter, by their attorneys, Harrison L. Winter, City Solicitor, Ambrose T. Hartman, Deputy City Solicitor, and Philip Z. Altfield, Assistant City Solicitor, and demur to the Petition For Writ of Mandamus filed herein against them, and for reason therefor say

1. That the Petition For Writ of Mandamus filed herein does not state a cause of action for which relief may be granted by way of mandamus.

2. And for such other reasons that may be assigned at the time of the hearing of this Demurrer.

Harrison L. Winter, City Solicitor, Ambrose T. Hartman, Deputy City Solicitor, Philip Z. Altfield, Assistant City Solicitor, Attorneys for Defendants.



## IN THE SUPERIOR COURT OF BALTIMORE CITY

## MEMORANDUM OPINION—April 27, 1961

This is an action brought by two avowed atheists who protest the continuing enforcement of a rule of the Board of School Commissioners of Baltimore City which provides that a chapter in the Holy Bible shall be read, or the Lord's Prayer recited, in the opening exercises of each school day. William J. Murray, III, who appears by his mother and [fol. 7] next friend, is a fourteen year old student in the ninth grade at Woodbourne Junior High School. His mother, Madalyn E. Murray, joins in the petition in the role of a citizen, resident and taxpayer. Respondents have demurred to the petition on the ground that it fails to state a cause of action for which relief may be had by mandamus. Since the demurrer admits all facts well pleaded, it is in order to recite the allegations in some detail.

The rule of the Board which petitioners claim is objectionable, was adopted in 1905, some fifty-six years ago, and with certain modifications has been in force ever since. It reads as follows:

"Section 6 — Opening Exercise. Each school, either collectively or in classes, shall be opened by the reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer. The Douay version may be used by those pupils who prefer it. Appropriate patriotic exercises should be held as a part of the general opening exercise of the school or class."

On November 17, 1960, upon the complaint of petitioners, the Board amended the rule by adding: "Any child shall be excused from participating in the opening exercises upon the written request of his parent or guardian." Not content with that, petitioners now seek to have the entire rule rescinded on the ground that it violates their rights under the First and Fourteenth Amendments of the Federal Constitution and under the basic authority of the School Board contained in Section 203 of Article 77 of the Maryland Code (1957 Ed.). The statute, incidentally, is quoted in part as empowering the Board to select textbooks for the

public schools of the City "provided such textbooks shall contain nothing of a sectarian or partisan character." The inference that the Holy Bible is either sectarian or partisan is a rather startling and novel thought.

Specifically, petitioners aver that the enforcement of the rule "threatens their religious liberty" in one way or another. Just how the religious liberty of a person who has no religion can be endangered is by no means made [fol. 8] clear. When a pertinent question on that score was asked petitioners' counsel during the argument, he had no answer but conveniently changed the subject.

It is further alleged that the rule "pronounces belief in God as the source of all moral and spiritual values, equating these values with religious values, and thereby renders sinister, alien and suspect the beliefs and ideals of your petitioners, promoting doubt and questions of their morality, good citizenship and good faith." All this is taking place, it is said, despite the fact that the rule has been in effect for more than half a century without apparently disrupting the morals or adversely affecting the good citizenship of the community. As to the amendment excusing pupils from attending such exercises, it is claimed that "The effect of said amendment is merely an opportunity for exclusion from a stated school exercise which a majority of the pupils have been taught to revere, and the exercise of which opportunity causes the excluded pupil, to wit: the petitioner, William J. Murray, III, to lose caste with his fellows, to be regarded with aversion, and to be subjected to reproach and insult." This is strong language. Quite naturally, it raises the question as to what might be the reaction of the pupils who "revere" the reading of Sacred Scripture and the recitation of prayer, if this were denied them.

The fundamental issue is clear, namely, whether the adoption and enforcement of the rule in question is a matter within the discretion of the Board or constitutes an illegal act. In the former event, the writ of mandamus will not be issued; in the latter, the Board's action may be restrained by the issuance of the writ. The applicable principle of law was well stated in *Upshur v. Baltimore*, 94 Md. 743, 746, 51 A. 953: ~

"It must be remembered that a writ of mandamus is not a writ of right granted as of course, but it is one which is allowed only at the discretion of the Court to whom the application is made. This discretion will not be exercised in favor of applicants unless some just or useful purpose may be answered by the writ." [fol. 9] *Booze v. Humbird*, 27 Md. 4. It is also well settled that the relator's right which is sought to be enforced must be a clear, distinct legal right. *State ex rel. O'Neill v. Register, et al.*, 59 Md. 287, and that it must be certain and free from doubt. Mandamus is an extraordinary process, and, if the right be doubtful, or the duty discretionary, or of a nature to require the exercise of judgment \* \* \* this writ will not be granted. \* \* \* And it will not be allowed unless the Court is satisfied that it is necessary to secure the ends of justice."

See also *Lee v. Leitch*, 131 Md. 30, 101 A. 716; *Thomas v. Field*, 143 Md. 128, 122 A. 25; *Red Star Line v. Baughman*, 153 Md. 607, 139 A. 291; *Walter v. Montgomery County*, 179 Md. 665, 22 A. 2d 472; *Hecht v. Crook*, 184 Md. 271, 40 A. 2d 673; *Masson v. Reindollar*, 193 Md. 683, 69 A. 2d 482; *Durkee v. Murphy*, 181 Md. 259, 29 A. 2d 233; *Mahoney v. Supervisor of Elections*, 205 Md. 325, 106 A. 2d 927; *District Heights v. Prince George's County*, 210 Md. 142, 122 A. 2d 489.

As already noted, the authority of the Board to pass the disputed rule is founded upon power given it by the legislature. The pertinent statutes are sections 202 and 203 of Article 77 of the Maryland Code (1957 ed.) which provide:

"202. *Authority to establish free school system.* The Mayor and City Council of Baltimore shall have full power and authority to establish in said city a system of free public schools, which shall include a school or schools for manual or industrial training, under such ordinances, rules and regulations as they may deem fit and proper to enact and prescribe; they may delegate supervisory powers and control to a Board of

School Commissioners; may prescribe rules for building schoolhouses, and locating, establishing and closing schools, and may in general do every act that may be necessary or proper in the premises."

[fol. 10] "203. *Powers and duties of Board of School Commissioners.* The Board of Commissioners of public schools of Baltimore City, or by whatever name the body may be known that has supervisory power and control over the public schools of Baltimore City, shall have power to examine, appoint and remove teachers, prescribe the qualifications, fix the salaries subject to the approval of the mayor and city council, and select textbooks for schools of said city; provided, such textbooks shall contain nothing of a sectarian or partisan character. The Board of Commissioners of public schools of said city shall annually make a report to the State Board of Education of the condition of the schools under their charge, to include a statement of expenditures, the number of children taught, and such other statistical information as may be necessary to exhibit the operation of the schools."

These statutes are important not only because they authorize the Board's actions, but also because they reveal that the legislature never intended that religion must be excluded from the public schools; but simply things "of a sectarian or partisan character." The legislature has proscribed the teaching of sectarian religion, not religion itself; and this policy is in complete harmony with both the First and Fourteenth Amendments of the Federal Constitution as explained by the United States Supreme Court.

The First Amendment, taken by itself, is of no avail to petitioners, for it merely prevents the Congress from making any law "respecting an establishment of religion, or prohibiting the free exercise thereof." However, the Fourteenth Amendment makes the First applicable to the states, so the two amendments must be read in conjunction with one another. It is important to note that neither amendment interdicts religion. Rather, the establishment of a state church, that is, sectarian and the interference with the free exercise of religion, are prohibited.

Three decisions of the Supreme Court, of recent vintage, should be given preferred attention. The first of these, [fol. 11] *Ererson v. Board of Education*, 330 U.S. 1, 91 L. Ed. 711, 67 S. Ct. 504, is not in point but does afford an insight into the Court's reasoning.

There, a New Jersey statute authorized the local school districts to make rules and contracts for the transportation of children to and from the schools. The Board of Education of Ewing Township authorized reimbursement to the parents of children using public transportation to attend school. Part of this money was for payment of transportation of children who went to parochial schools. These schools regularly give their pupils religion training in the Catholic Faith. A taxpayer filed suit challenging the right of the Board to reimburse parents of parochial school students, contending that this practice violated both the Federal and State Constitutions. The trial court held the legislature was without power to authorize such payment under the New Jersey Constitution, but this was reversed by the New Jersey Court of Errors and Appeals. The Supreme Court affirmed in a five-to-four opinion.

Next came the celebrated case of *McCollum v. Board of Education*, 333 U.S. 203, 92 L. Ed. 649, 68 S. Ct. 461, decided in 1948.

The School Board of Champaign, Illinois had set up a released-time program for public school pupils whereby ministers, priests and a rabbi were permitted to use the classrooms for religious instruction or services. Any child wishing to be excused was permitted to do so upon presenting a note from his parents but was required to remain in the school study hall or elsewhere until dismissed for the day. The constitutionality of this arrangement was approved by the lower courts, but rejected by the United States Supreme Court.

This decision was at first heralded as a victory for atheism. However, a careful reading of the various opinions and concurring opinions fails to support that conclusion at all. Justice Frankfurter, for example, speaking for the majority, quoted and relied heavily on the remarks of President Grant in his address to the Army of the Tennessee in 1875:

[fol. 12] "Encourage free schools and resolve that not one dollar appropriated for their support shall be appropriated to the support of any sectarian schools. Resolve that neither the State nor nation, nor both combined, shall support institutions of learning other than those sufficient to afford every child growing up in the land the opportunity of a good common-school education, *unmixed with sectarian, pagan, or atheistical dogmas*. Leave the matter of religion to the family altar, the church, and the private school, supported entirely by private contributions. Keep the church and the state forever separate." (Emphasis supplied.)

Of equal interest are the views of Justice Jackson, who, while concurring with the majority of the Court, objected to the sweeping effect of its ruling:

"Perhaps subjects such as mathematics, physics or chemistry are, or can be, completely secularized. But it would not seem practical to teach either practice or appreciation of the arts if we are to forbid exposure of youth to any religious influences. Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete even from a secular point of view. Yet the inspirational appeal of religion in these guises is often stronger than in forthright sermon. Even such a science as biology raises the issue between evolution and creation as an explanation of our presence on this planet. Certainly a course in English literature that omitted the Bible and other powerful uses of our mother tongue for religious ends would be pretty barren. And I should suppose it is a proper, if not an indispensable part of preparation for a worldly life to know the roles that religion and religions have played in the tragic story of mankind. The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived [fol. 13] from paganism, Judaism, Christianity—both Catholic and Protestant—and other faiths accepted by



a large part of the world's people. One can hardly respect a system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared."

The third decision is that of *Zorach v. Clauson*, 343 U.S. 306, 96 L. Ed. 954, 72 S. Ct. 679, which most commentators consider to be a retreat from *Everson* and *McCullum*.

New York City has a program which permits its public schools to release students during the school day so that they may leave the school building and grounds and go to religious centers for instructions or devotional exercises. A student is released on written request of his parents. Those not being released stay in the classrooms. The churches or synagogues make weekly reports to the schools, sending a list of children who have been released from public schools but who have not reported for religious instructions. The New York Court of Appeals sustained its constitutionality and this was affirmed by the Supreme Court. The interesting language in that case is found in the following words of Justice Douglas:

"We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the [fol. 14] public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. \* \* \*

There can be no doubt that historically and in keeping with ancient tradition, Maryland, and its citizens, have always been religious. Indeed, the great seal of the State contains the motto "Scuto Bonae Voluntatis Tuae Coronasti Nos" meaning "with favor wilt Thou compass us as with a shield". (Psalms v: 12).

There was one other case before the Supreme Court in which a question, quite similar to the one involved, was raised. However, the appeal was dismissed for want of standing of the appellant in an action wherein the high court of New Jersey had upheld the reading of the Bible in the public schools of that state. *Doremus v. Board of Education*, 342 U.S. 429; 96 L.E. 475; 72 S. Ct. 394.

If religion, pure and undefiled and in every form, were removed from the classrooms, there would remain only atheism. While the present petitioners clamor for religious freedom, their ultimate objective is religious suppression. The two concepts are mutually repugnant. One cannot practice ~~his~~ religion if he has no religion to practice. If petitioners were granted the relief sought, then they, as non-believers, would acquire a preference over the vast majority of believers. Our government is founded on the proposition that people should respect the religious view of others, not destroy them.

In at least one other decision of a state court, a released time program was approved with qualifications. In *Perry v. School District*, 54 Wash. 2d 886, 344 P. 2d 1036, the Washington Supreme Court upheld the constitutionality of the program but modified the judgment of the lower court to the extent of holding that the distribution of information cards in public schools when making announcements or explanations for the purpose of obtaining parent consent for their children's participation in the released time program, by representatives of religious groups or instructors in the schools was in contravention of the state constitution. Thus sectarian control was proscribed.

In New York, the sole issue of prayers in public schools was contested in *Engel v. Vitale*, 191 N.Y.S. 2d 453 (Sup. Ct. 1959). Taxpayers in the school district brought mandamus proceedings to compel the Board of Education to discontinue the use, in public schools, of the prayer "Al-

mighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our Country." In a lengthy opinion by Justice Meyer the Special Term held that the "establishment" clause of the First Amendment did not prohibit the *non-compulsory* saying of prayer in public schools so long as the School Board takes affirmative steps to protect the rights of those who, for whatever reason, choose not to participate in the saying of the prayer.

Another case of interest is that of *Schempp v. School District*, 177 F. Supp. 398 (E.D. Pa. 1959), in which a Unitarian parent sought to enjoin enforcement of a state statute providing for the reading of ten verses of the Holy Bible in public school classrooms each day. In an ably written opinion by Judge Biggs, it was held that the statute in question was unconstitutional but it was further noted that attendance at such Bible reading was compulsory under Pennsylvania Law. The inference is broadly spelled out that if pupils who objected to hearing the Bible read could be excused, a different conclusion would probably have been reached. In this connection, it should be noted that the present respondents have expressly made provision to release the students upon written request from their parents to that effect.

Incidentally, the rule of the Board of School Commissioners in Baltimore City is by no means unique. Many [fol. 16] states have statutes requiring the Bible to be read in the public schools.\*

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\* Alabama, Ala. Code tit. 52 Sec. 542 (1940); Delaware, Del. Code Ann. tit. 14, Sec. 4102 (1953); Georgia, Ga. Code Sec. 32-705 (1933); Idaho, Idaho Code Ann. Sec. 33-2705-07 (1947); Kentucky, Ky. Rev. Stat. Ann. Sec. 158.170 (1955); Maine, Me. Rev. Stat. Ann. ch. 41, Sec. 145 (1954); New Jersey, N.J. Rev. Stat. Sec. 18:14-77 (1937); also provided for is the reading of the Lord's Prayer, N.J. Rev. Stat. Sec. 18:14-78 (1937); Pennsylvania, Pa. Stat. Ann. tit. 24, Sec. 15-1516 (1950); Tennessee, Tenn. Code Ann. Sec. 49-1307 (1955). Note: in the above statutes only Georgia and Kentucky provide for students to be excused \* \* \* with parent or guardian permission. Some states merely provide that the Holy Scripture may be read in public schools: Kansas, Kan. Gen. Stat. Ann. Sec. 72-1628 (Supp. 1957); North Dakota (at option of

It is abundantly clear that petitioners' real objective is to drive every concept of religion out of the public school system. If God were removed from the classroom, there would remain only atheism. The word is derived from the Greek *atheos*, meaning "without a god." Thus, the beliefs of virtually all the pupils would be subordinated to those of Madalyn Murray and her son. Any reference to the Declaration of Independence would be prohibited because it concludes with the historic words of the signers, "... with a firm reliance on the protection of Divine Providence we mutually pledge to each other our Lives, our Fortunes and our sacred Honor." Any mention of Lincoln's Gettysburg Address would be anathema because in it the Great Emancipator prayed that "this nation, under God, shall have a new birth of Freedom." It is even possible that United States currency would not be accepted in school cafeterias because every bill and coin contains the familiar inscription, *In God We Trust*.

The court finds that the facts alleged in the petition for a writ of mandamus do not spell out any violation of petitioners' constitutional rights. The power of the School [fol. 17] Board to require the reading of the Holy Bible or recitation of the Lord's Prayer as part of the opening exercises each day, with the provision that objecting students may be excused, is a matter within the Board's discretion. For this reason, the writ of mandamus cannot be issued. The court is informed by counsel that there are no additional facts that could be added by amendment so it necessarily follows that it would be futile to afford petitioners the opportunity to amend. Accordingly, for the reasons given, the demurrer is sustained without leave to amend and the petition is dismissed.

J. Gilbert Prendergast, Judge.

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teacher, but parent or guardian may excuse child). N.D. Rev. Code Sec. 15-3812 (1943); Oklahoma, Okla. Stat. Ann. tit. 70, Sec. 11-1 (1941). Two states provide that the Bible shall not be excluded from their public schools: Indiana, Ind. Ann. Stat. Sec. 28-5101 (1948); and Iowa, Iowa Code Ann. Sec. 280.9 (1946).

[fol. 18]

## IN THE COURT OF APPEALS OF MARYLAND

September Term, 1961

No. 90

WILLIAM J. MURRAY, 3RD, infant by MADALYN E. MURRAY,  
his mother and next friend, and MADALYN E. MURRAY,  
Appellants,

v.

JOHN N. CURLETT, President, et al., individually and con-  
stituting THE BOARD OF SCHOOL COMMISSIONERS OF BALTI-  
MORE CITY, Appellees.

APPEAL FROM THE SUPERIOR COURT OF BALTIMORE CITY  
(J. GILBERT PRENDERGAST, JUDGE)

**Appellees' Appendix—Filed September 25, 1961**

[fol. 19]

OPINION OF ATTORNEY GENERAL OF MARYLAND—  
November 2, 1960

Re: Public School Opening Exercise

Dr. Thomas G. Pullen, Jr.  
State Superintendent of Schools  
State Department of Education  
301 W. Preston St.  
Baltimore 1, Md.

Dear Mr. Pullen:

You have brought to our attention a situation which has arisen in one of the public schools of Baltimore City. The matter pertains to the legal obligation of a student, age 14, who professes to be an atheist, to attend school over



his objection that the school was enforcing religious training. The specific objections raised are to the morning opening exercise in which a selection from the Bible is read without comment, and to the use of the "Story of Nations" history text in which, according to the student's mother, "distortions and misrepresentations are made, particularly in the areas of religious and political interpretations of events, both historic and current."

## I.

As to the question of attendance generally, we refer you to the provisions of Article 77, Section 231, Annotated Code of Maryland (1957 Ed.). This law, known as the Compulsory School Attendance Law, makes school attendance of children between the ages of seven and sixteen years mandatory. The exception for children of sub-normal intelligence is not pertinent here. This mandate applies both to the children and their parents. A violation is made a misdemeanor punishable by a \$5.00 fine for each offense. Objection to curriculum, textbooks, exercises, teachers, etc., is not a valid excuse for non-compliance with this law. The only recourse for persons objecting to attendance on [fol. 20] grounds similar to the above would be to enroll in a private school. We therefore advise, in the instant case, that if the parent and child refuse to comply with Section 231, for the reasons they currently advance, they should be prosecuted for truancy as specified in the law. Such action would not be a deprivation of any personal constitutional rights, real or illusory, which they might wish to protect. These rights may be presented and litigated if necessary in other ways, such as a proceeding by the protestants against the School Commissioners for mandamus or injunctive relief.

## II.

Next we turn to the issue concerning the use of a history textbook, "Story of Nations", by Henry Holt & Co., Inc., edited by Professors Lester B. Rogers and Fay Adams, of the University of Southern California and Walker Brown, of a Los Angeles high school. This text, written for the



ninth and tenth grade level, covers the whole span of world history. Obviously, it is not written or intended to be a detailed account. As a matter of academic interest only, we have reviewed the book and in particular the portions cited as objectionable, and we find it to be an accurate, objective and intellectual history book. However, it is not our duty or prerogative to review textbooks used in the schools of this State. This is a matter wisely left to the discretion of the school authorities.

Section 145 of Article 77, Code, provides:

*"Freedom from sectarianism or partisanship. School books shall contain nothing of a sectarian or partisan character."*

This, of course, does not mean that in a history text there may be no reference to religion generally or to roles played by various religious figures or denominations in the development of history. Such a contention would be illogical and unsupported in law. Article VI, Section 7 (Textbooks) of the Rules of the Board of School Commissioners, relating to approval of a majority of the Board in the selection [fol. 21] of books, has been reviewed by us, and it appears to adequately cover this matter.

No right exists in a student or his parents to object to the use of any particular textbooks or in a student to legally absent himself from a class using a book he dis-favors. If the latter event occurs the student should be disciplined in such manner as the teacher and school principal see fit. The provisions of Section 131 of the Public School Laws authorize suspension and expulsion in proper cases.

### III.

The final question relates to validity of Article VI, Section 6, of the Rules of the Board of School Commissioners of Baltimore City. This rule provides as follows:

*"Section 6—Opening Exercises. Each school, either collectively or in classes, shall be opened by the reading, without comment of a chapter in the Holy Bible and/or the use of the Lord's Prayer. The Douay ver-*

sion may be used by those pupils who prefer it. Appropriate Patriotic exercises should be held as a part of the general opening exercises of the school or class."

The uniform practice under this rule in the public schools of Baltimore City has been to read from the King James Version of the Holy Bible. No question has been raised concerning the "patriotic exercise", the use of the particular version of the Bible, or the recitation of a prayer; therefore, these matters are not discussed here. The sole issues can be reduced to two: Is Bible reading in public schools constitutional *per se*, and, if so, must the rule providing for such an exercise, further provide for the excuse of those who object? We answer both questions in the affirmative.

#### A.

The objections to Bible reading, or any devotional exercise, in the public school have been based upon the initial prohibition of the First Amendment to the United States [fol. 22] Constitution as made applicable to the States through the Fourteenth Amendment. The provision prohibits State "establishment of religion". In the landmark case of *Zorach v. Clauson*, 343 U.S. 306, 96 L. Ed. 554, the Supreme Court held that the New York "released time" program was not a violation of constitutional "establishment" clause. Justice Douglas reviewed our fundamental policy toward religion at page 313, as follows:

"We are a religious people whose institutions presuppose a Supreme Being: We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the State encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates

the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. . . ."

It would seem reasonable to conclude that the "establishment" clause dictates that there be a separation between church and state, but not that the state need be stripped of all religious sentiment. It would be tragic if the State of Maryland, whose history, traditions, founding, and its early laws are steeped in religious connotations, would be compelled to forbid to its children as a part of their education, the right and duty to bow their heads in humility before the Supreme Being. It is interesting to note that the State Seal bears a Biblical inscription: "Scuto Bonae Voluntatis Tuæ Coronasti Nos"—Thou has crowned us with the shield of Thy good will (Psalm 5:12). [fol. 23] As was said in *Engel v. Vitale*, 191 N.Y.S. 2d 453, at 486:

"The democratic nature of our government precludes the imposition of sanctions in the field of religion; the religious nature of the governed/sanctions the inclusion of religion in the processes of democratic life; the dividing line between permitted accommodation and proscribed compulsion is a matter of degree, to be determined anew in each new fact situation."

Such accommodation, if properly qualified as hereinafter mentioned, does no violence to the First Amendment of our Federal Constitution. Of the cases we have found dealing with the reading of the Bible, ten have upheld and only three have struck down the practice. (Upheld: *Doremus v. Board of Education*, 5 N.J. 435, 75 A. 2d 880, 1950, app. diss. 342 U.S. 429, 96 L. Ed. 475; *Donahoe v. Richards*, 1854, 38 Me. 379; *Hart v. School District*, 2 Lanc. L.R. 346; *Messle v. Hum*, 1 Ohio N.P. 140; *Stevenson v. Hanyon*, 4 Pa. Dist. R. 395; *Carran v. White*, 22 Pa. Co. Ct. R. 201; *Pfeiffer v. Board of Education*, 118 Mich. 560, 77 N.W. 250; *Kaplan v.*

*Independent School District*, 171 Minn. 142, 214 N.W. 18; *People ex rel. Vollmar v. Stanley*, 81 Colo. 276, 255 P. 610; *Lewis v. Board of Education*, 285 N.Y.S. 164;—Struck down; *Schempp v. School District of Abington*, 177 F. Supp. 398, Pa.—1959, remanded by U.S. Supreme Ct. 10/24/60, 29 L.W. 3120; *State ex rel. Weiss v. District Board*, 76 Wis. 177, 44 N.W. 967; *State ex rel. Dearle v. Frazier*, 102 Wash. 369, 173 P. 35.)

Two recent holdings, supporting the position we now adopt have undertaken to review the whole field of state-church relationship and the history of religious freedom in the light of our First Amendment, *Engel v. Vitale*, *supra*, and *Doremus v. Board of Education*, *supra*.

The principle thus adduced does not belittle the parents' primary right of control over their children. However, the State, when acting in the general welfare of all its citizens, has a paramount right of control if there can be shown to be a substantial nexus between the action required and the end sought to be attained.

[fol. 24]. Among the many instances of legal regulation of religious acts are the use of fluorinated water, *Baer v. City of Bend* (Ore.), 292 P. 2d 134; the sale of Watchtower magazine by minors, *Prince v. Mass.*, 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645; observance of the Sabbath, *Seales v. State*, 47 Ark. 476, 1 S.W. 769; vaccination, *Vonnegut v. Baun*, 206 Ind. 172, 188 N.E. 677; physical examination of school children, *Streich v. Board of Education*, 34 S.D. 169, 147 N.W. 779; salute to flag, *Minersville School Dist. v. Gobitis*, 108 F. 2d 683.

As applied to this case, we believe that while every individual has a constitutional right to be a non-believer, that right is a shield, not a sword, and may not be used to compel others to adopt the same attitude.

## B.

Having ruled that it is constitutional to require the reading of the Bible as a morning exercise in our public schools, we turn to the matter of compulsion in joining such exercise. The second tenet of the First Amendment, as made applicable to the States through the Fourteenth Amend-

ment, prohibits restriction of the "free exercise" of religion. The *Zorich* and *Engel* cases, *supra*, as well as other cases in this area, uniformly hold that despite the basic principle, a school devotional exercise would nonetheless be objectionable if there were any direct compulsion. Any coercion would be an abridgment of one's individual right to the "free exercise" of religion. As noted in *Hopkins v. State*, 193 Md. 489, the sole qualifications to religious freedom relate to acts rather than to beliefs. See also *Reynolds v. U.S.*, 98 U.S. 145, 25 L. Ed. 244. Freedom of belief is absolute. The Supreme Court in *Everson v. Board of Education*, 330 U.S. 1, 91 L. Ed. 711, and *Illinois ex rel. McCullum v. Board of Education*, 333 U.S. 203, 92 L. Ed. 648, recognizes that freedom to believe includes freedom not to believe at all. That is to say, an atheist has equal rights with those who are theistic. The *Zorach* case, *supra*, represented a retreat from the prior views only to the extent that the Court refused priority to the non-believer's right.

[fol. 25] For the reasons stated, we are of the opinion that the present rule regarding Bible-reading must be amended to provide a procedure to protect the rights of those who choose not to participate. The exact provision to be made is best left to the discretion of the Board. We do suggest that non-participation be allowed to take the form of either remaining silent during the exercise, or if the parent or child so desires, of being excused entirely from the exercise. The latter course should be handled discreetly without comment or punishment. You may wish to allow non-participants to arrive at the conclusion of the exercise. We further caution that the exercise should be conducted without requirement or restriction as to the specific posture, language, dress or gestures to be used by individual participants, so as not to interfere with personal religious customs.

We recognize it may be contended that even such a provision for non-participation will not cure an alleged compulsion through the subtle pressure of embarrassment. On this issue we concur in the reasoning of the *Engel* case, *supra*, at 492:



"To recognize 'subtle pressures' as compulsion under the amendment is to stray far afield from the oppressions the Amendment was designed to prevent; to raise the psychology of dissent, which proffers pressure on every dissenter, to the level of governmental force; and to subordinate the spiritual needs of believers to the psychological needs of nonbelievers (is unnecessary)."

The *Engel* case was affirmed by the New York Supreme Court of Appeals Division 2d Dept. on October 17, 1960 (29 L.W. 2178). Justice Beldock aptly stated:

"It may well be that, despite all these safeguards, some vestige of compulsion due to embarrassment may still remain. Such embarrassment, however, is the inevitable consequence of dissent. It is the price that every nonconformist must pay."

[fol. 26] It is our conclusion that while the Board may properly provide for a morning devotional exercise, it must further provide that those so desiring should be excused from attendance at this exercise.

Very truly yours,

C. Ferdinand Sybert, Attorney General.  
James O'C. Gentry, Asst. Attorney General.

CFS:MH  
JOG



[fol. 27]

## IN THE COURT OF APPEALS OF MARYLAND

No. 90

September Term, 1961

WILLIAM J. MURRAY, III, Infant, etc., et al.,

v.

JOHN N. CURLETT, et al. and BOARD OF SCHOOL  
COMMISSIONERS OF BALTIMORE CITY.Brune, C.J., Henderson, Hammond, Prescott, Horney,  
Marbury, Barrett, Lester L. (Specially Assigned), JJ.

OPINION BY HORNEY, J.—April 6, 1962

Brune, C.J., Henderson and Prescott, JJ., dissent.

[fol. 28] This appeal presents the question of whether the daily opening exercises of the Baltimore City public schools—wherein the Holy Bible is read and the Lord's Prayer is recited—violate the constitutional rights of a student and his mother who claim they are atheists.

The judgment appealed from is one for costs entered by the lower court after it had sustained without leave to amend the demurrer of the appellees (the Board of School Commissioners of Baltimore City and the president and other individual members thereof constituting the "Board") to the petition of the appellants (William J. Murray, III, the "student," and Madalyn E. Murray, the "mother" or "parent") for a writ of mandamus. The writ was sought to compel the Board to "rescind and cancel" a rule (and a recent amendment of it) adopted by the Board in 1905, pursuant to the power and authority conferred on it by the State, concerning the opening exercise program in the public schools. The rule and amendment attacked is designated as § 6 of Article VI of the Rules of the Board, and reads as follows:

"Section 6—Opening Exercises. Each school, either collectively or in classes, shall be opened by the reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer. The Douay version may be used by those pupils who prefer it. Appropriate patriotic exercises should [also] be held as a part of the general opening exercise of the school or class. *Any child shall be excused from participating in the opening exercises or from attending the opening exercises upon written request of his parent or guardian.*"

[fol. 29] The italicized portion of the rule was added by an amendment on November 17, 1960, in order to comply with an opinion rendered by the Attorney General (C. Ferdinand Sybert, now a member of this Court) at the request of the State Superintendent of Schools following a protest by the appellants to the effect that to require the atheistic student to attend the daily exercises was to compel him to participate in a religious training program that was offensive to him.

The petition, in addition to stating that the fourteen year old boy is a student in a public school and that the parent is a resident and taxpayer, further states that the practice under the rule had been to read from the King James version of the Bible and that the student, until the adoption of the amendment, was "required and compelled" to attend the reading program and to recite the Lord's Prayer, but that when the amendment was made he was excused at the request of his mother from further attendance.

The petitioners, in contending that the mandatory rule contravenes their freedom of religion under the first and fourteenth amendments in that it violates the principle of separation between church and state,<sup>1</sup> claim that the en-

<sup>1</sup> The petitioners also contended that the rule was contrary to the provisions of the Code (1957), Art. 77, § 203, proscribing the selection of textbooks of "a sectarian or partisan character," but, other than stating in their brief that they objected to the conduct of religious teachings, whether sectarian or non-sectarian, in public schools, they did not pursue this contention on appeal.

forcement of the rule "threatens their religious liberty" in [fol. 30] one way or another; that the rule, "subjects their freedom of conscience to the rule of the majority"; and that the rule, by equating moral and spiritual values with religious values has thereby rendered their beliefs and ideals "sinister, alien and suspect" which tends to promote "doubt and question of their morality, good citizenship and good faith."

It is further claimed that the amendment excusing the student from participating in or attending the opening program "in no wise negates or mitigates the violation and infringement of their constitutional rights"; that the exclusion of the student has caused him to lose caste, to be regarded with aversion, and to be subjected to reproach and insult; and that the practice "tends to destroy the equality of the pupils" and place him in a disadvantageous position with respect to other pupils.

In conclusion, the petitioners state that although they have requested a cessation of the practice, the use of the rule has not ceased, but has been continued, and that they are thereby harmed.

The Board demurred to the petition on the ground that it did not state a good cause of action for which relief could be granted by way of mandamus. The lower court sustained the demurrer and dismissed the petition without leave to amend. In its memorandum opinion, the court stated two reasons for the action taken. The ultimate decision was based on the theory that the Board, in requiring [fol. 31] that the Holy Bible be read or the Lord's Prayer be recited each school day as a part of the opening exercises, with a proviso that objecting students could be excused, was acting in the exercise of discretionary power that the issuance of a writ of mandamus could not stay. But prior to that, the court had found that the facts alleged in the petition for the writ did not "spell out any violation" of the constitutional rights of the petitioners.

Arguments in this case were heard twice. The initial argument was heard by five of the seven judges of this Court on both questions presented by the appeal: (i) whether mandamus is a proper action in which to test the constitutionality of the school board rule; and (ii) whether

the provisions of the regulation under attack violate a constitutional right of the petitioners. The reargument was heard by seven judges, one of whom was substituting for Judge Sybert, and in the order directing reargument, we limited the reargument to the constitutional questions raised by the petition. We were then of the opinion and we now hold that where the performance of a duty prescribed by law depends on whether the statute or regulation is constitutional or invalid, there is no reason why the question may not be determined on a petition for a writ of mandamus under such circumstances as are present in this case. *Wick v. Swasey*, 79 N.E. 745 (Mass., 1907); 38 Corpus Juris, *Mandamus*, § 681b(1); 16 C.J.S., *Constitutional Law*, § 95. See also *High's Extraordinary Legal Remedies* (3rd ed.), [fol. 32] § 332b, p. 325, where, in citing *State v. District Board*, 76 Wis. 177 (1890), it is said that "[m]andamus will lie against a board intrusted with the management of public schools to compel them to discontinue the reading of the Bible in such schools." Moreover, there are a number of decisions in this state where the courts without challenge as to the propriety thereof have proceeded to determine a constitutional question preliminary to the grant or refusal of a writ of mandamus. See, for example, *Universita v. Murray*, 169 Md. 478, 182 Atl. 590 (1936); *Williams v. Zimmerman*, 172 Md. 563, 192 Atl. 353 (1937); *Torcasso v. Watkins*, 223 Md. 49, 162 A.2d 438 (1960), *reversed* (on another ground and decided on merits), 367 U.S. 488 (1961).

The principal question is whether the demurrer was properly sustained. The appellees contend preliminarily that the petitioners have not shown they have standing to challenge the rule and the practice under it in the schools of Baltimore City.

If the petitioners lacked standing to sue, this would require affirmance even though the rule and the practice were unconstitutional. Since we find them to be constitutional, we shall assume the petitioners had standing to sue and proceed to discuss the reasons for our views as to constitutionality.

The essential question thus presented is whether the daily Bible reading and Prayer recitation program, at which attendance is not compulsory, is a violation of the

"establishment of religion", and "free exercise" clause of the First Amendment (as applied to the States through the due process clause of the Fourteenth) or of the "equal [fol. 33] protection" clause of the Fourteenth Amendment. We think that neither constitutional provision is violated, for, as we see it, neither the First nor the Fourteenth Amendment was intended to stifle all rapport between religion and government.

"We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe."

Thus spoke Justice Douglas (at p. 313) in the majority opinion in *Zorach v. Clauson*, 343 U.S. 306 (1952).

The Supreme Court of the United States has not yet passed on either of the constitutional questions posed by this appeal. Yet, there are several decisions concerning the separation of Church and State which we think point the way and clearly indicate that a public school opening exercise such as this one—where the time and money spent on it is inconsequential—does not violate the religious clauses of the First Amendment or the equal protection clause of the Fourteenth Amendment, as would the teaching of a sectarian religion in a public school on school time and at public expense.



[fol. 34] The first of the cases we have in mind is *Erverson v. Board of Education*, 330 U.S. 1 (1947), where the Court, though it recognized that the clause against the establishment of religion was intended to erect "a wall of separation between church and state," held that the reimbursement of parents for the cost of transporting their children to parochial and public schools by bus did not violate the "establishment of religion" clause of the First Amendment because the purpose of the New Jersey statute was to provide safe transportation in the general public welfare.

In *McCollum v. Board of Education*, 333 U.S. 203 (1948), however, where the Illinois public schools and the machinery for compelling attendance thereat were used by sectarian teachers to give religious instruction in such public schools to those pupils who were required to attend the religious classes at the request of their parents, while the other pupils (who were not attending the religious classes) were compelled to attend secular classes instead of being released, the Court held in no uncertain terms that such practices fell "squarely under the ban of the First Amendment (made applicable to the States by the Fourteenth)."

And four years later in *Zorach v. Clauson*, *supra*, the Court, though following the *McCollum* case, distinguished it nevertheless by stating that a "released time" program of a type different from that involved in *McCollum* was not unconstitutional. In New York the public schools are permitted to release students during school hours on the request of parents to go to classes off school premises for [fol. 35] religious instruction, but those who are not so released stay on in public school classrooms. In holding that the program did not violate the First Amendment through the Fourteenth, the Court, after noting that the program did not involve religious instruction in public schools or the expenditure of public funds, nor the use of coercion to require public school students to go to religious classrooms, went on to point out (at p. 312) that if the First Amendment "in every and all respects" required a separation of Church and State, then:



"Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'so help me God' in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: 'God save the United States and this Honorable Court.'"

This then may well be the key to the difficult problem with which we are confronted.

We think there is little doubt that a decision in this case lies somewhere between the decision in *McCollum* and that in *Zorach*. In the *McCollum* case, where the "tax-established and tax-supported public school system [was utilized] to aid religious groups to spread their faith," the released time program was unconstitutional. And, in the *Zorach* case, where the public schools did no more than "accommodate their schedules to a program of outside religious instruction," the program was constitutional. It [fol. 36] is to be noted, however, that both programs were conducted during school hours, though one involved the use of state funds and the other was at the expense of the churches. But, here, where the use of school time and the expenditure of public funds is negligible, we think the daily opening exercises of the schools in Baltimore City are in the same category as the opening prayer ceremonies in the Legislature of this State and in the Congress of the United States, in the public meetings and conventions which are opened with prayers or supplications to God, and in the formal call of court sessions by the erier in State and Federal courts. For these reasons, and particularly because the appellant-student in this case was not compelled to participate in or attend the program he claims is offensive to him, we hold that the opening exercises do not violate the religious clauses of the First Amendment.

With regard to the effect of having been excused from attending the opening exercises, we think it is significant that the Supreme Court, in *School District of Abington*

*Township v. Schempp*, 364 U.S. 298 (1960), ordered *per curiam* that the judgment below be vacated and remanded the case to the district court for further proceedings, after it was learned that the Pennsylvania law had been so amended as to provide for the excusing of those students who objected to participating in a school opening ceremony quite similar to that in Baltimore City. It seems to us that the remand of this case at least indicated that the use of coercion or the lack of it may be the controlling factor in deciding whether or not a constitutional right has been [fol. 37] denied. In reaching this conclusion we are not unmindful that the District Court for the Eastern District of Pennsylvania has, upon the remand, reheard the case, and again held (in an opinion by Jolin Biggs, Jr., Circuit Judge, reported in F.Supp.2d [1962]) that the Pennsylvania statute is not constitutional despite the fact that objecting students could have been excused on the request of their parents, but we do not find the decision on remand persuasive and decline to follow it. Moreover, we think it is clear that the case at bar is not governed by the *McCullum* case on the question of compulsory participation, even though *McCullum* was "followed" in *Zorach* as well as in *Torcaso* on the "separation of church and state" point. In *McCullum*, there was a degree of compulsion, but in this case, as in *Zorach*, all compulsion has been removed so far as attendance of the appellant-student at the opening exercises is concerned.

Furthermore, we are not convinced that *Torcaso v. Watkins* (367 U.S. 488) has any bearing on our problem. True, it is a case involving the separation of church and state, but we think it is clearly distinguishable from the instant case. There, in holding that "neither a State nor the Federal Government can constitutionally force a person to profess a belief or disbelief in any religion," the Court went on to say (at p. 495) that the fact "that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by a state-imposed criteria forbidden by the Constitution." In that case the [fol. 38] Court was concerned with the compulsion which required a non-believer to profess a belief in God in order to qualify for public office. The present case, however,

as has been pointed out, is completely devoid of any compulsion or coercion to attend the school opening exercises. Nor do we find any sustenance for the appellant-student in the Sunday Blue Law cases, including *McGowan v. Maryland*, 366 U.S. 420 (1961), which was cited at the reargument.

The Bible reading and Prayer recitation programs in the public schools of other states, at which attendance was not compulsory, have been held to be valid by the appellate courts of such states. In an early case, *Church v. Bullock*, 109 S.W. 115 (Tex. 1908), the Court, in upholding a resolution stipulating that students should be present at, but were not required to participate in, the public school exercises in which the Bible was read and the Lord's Prayer was recited, held that the program did not contravene the constitutional provision against the use of public funds to support sectarian religion. In the case of *People ex rel. Vollmar v. Stanley*, 255 Pac. 610 (Colo. 1927), the Court, although stating that children could not be required against the will of their parents to attend the reading of the Bible in public schools, nevertheless held that the Bible reading ceremony could not be prohibited altogether. In a comparatively recent case, *Doremus v. Board of Education*, 75 A.2d 880 (N.J. 1950); appeal dismissed 342 U.S. 429 (1952), the Supreme Court of New Jersey, in observing that the First Amendment did not prohibit the recognition of God, held that the noncompulsory practice of reading the Bible and reciting the Lord's Prayer, in conformity with the [fol. 39] applicable statute, did not constitute the establishment of religion or prohibit the free exercise thereof. And the recent case of *Engel v. Vitale*, 10 N.Y.2d 176, 218 N.Y.S.2d 659 (1961), presently pending in the Supreme Court of the United States, the Court of Appeals of New York affirmed by a divided court a decision of the Appellate Division (206 N.Y.S.2d 183) holding that the noncompulsory daily recitation of the "regents prayer"<sup>2</sup> in the public

<sup>2</sup> This prayer which is recited following the pledge of allegiance to the flag at the beginning of each school day is worded as follows: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."

schools was not violative of either the state or federal guarantee of freedom of religion. See also *Donahoe v. Richards*, 38 Me. 379 (1854); *Moore v. Monroe*, 20 N.W. 475 (Iowa 1884); *Pfeiffer v. Board of Education*, 77 N.W. 250 (Mich. 1898); *Billiard v. Board of Education*, 76 Pac. 422 (Kan. 1904); *Hackett v. Brooksville Graded School District*, 87 S.W. 792, (Ky. 1905); *Wilkerson v. City of Rome*, 110 S.E. 895 (Ga. 1922); *Kaplan v. Independent School District*, 214 N.W. 18 (Minn. 1927); and *Lewis v. Board of Education*, 285 N.Y.S. 164 (N.Y.Misc.), modified 286 N.Y.S. 174 (App.Div.), rehearing denied 288 N.Y.S. 751 (App.Div.), appeal dismissed 12 N.E.2d 172 (Ct. of Apls. 1937), for other cases that have sustained the reading of the Bible and the recitation of prayers, including the Lord's Prayer, in public schools. And see the annotation in 45 A.L.R.2d 742.

[fol. 40]. We come now to the other constitutional question as to whether the appellant-student has been denied the equal protection of the laws guaranteed to him by the Fourteenth Amendment. He relies on *Brown v. Board of Education*, 347 U.S. 483 (1954), declaring as unconstitutional the segregation of the races in public schools, to support the theory that his self-exile from the opening exercises is having a deleterious effect on his relationship with other students in the school. The short answer to this claim is that the equality of treatment which the Fourteenth Amendment affords cannot and does not provide protection from the embarrassment, the divisiveness or the psychological discontent arising out of non-conformance with the mores of the majority. Cf. Footnote 7 to *Zorach v. Clauson*, *supra*, at p. 311 of 343 U.S. And see *Engel v. Vitale*, 191 N.Y.S.2d 453 (Spec.Term 1959). We hold that the opening exercises do not violate the equal protection clause of the Fourteenth Amendment.

Inasmuch as the Supreme Court has not yet spoken with respect to the Bible reading and Prayer recitation ceremonies at school opening exercises, we think we are bound by what we understand is the effect of *McCullum* as it is explained and expanded in *Zorach* until such time as the Court speaks further in this uncertain area. So, having

decided that the school opening exercises in Baltimore City are not violative of either the First or Fourteenth Amendments, we hold that the demurrer as to both appellants was properly sustained.

For the several reasons stated herein, the judgment will be affirmed.

Judgment Affirmed; Appellants to Pay the Costs.

[fol. 41]

#### DISSENTING OPINION

Brune, C.J., dissenting.

This suit for a writ of mandamus brought by a minor through his mother as next friend and by his mother as such and as a taxpayer seeks to bar from the public schools of the City of Baltimore "the reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer." Such reading from the Bible and/or use of the Lord's Prayer are required, either collectively or in classes, as a part of the opening exercises in the public schools of Baltimore under a rule of the Board of School Commissioners of that City adopted in 1905 and amended in November, 1960 by adding this provision: "Any child shall be excused from participating in the opening exercises upon the written request of his parent or guardian." The respondents in the suit are (or were) the members of the Board of School Commissioners of Baltimore City.

The petitioners allege *inter alia*: that the minor petitioner is a student at one of the public schools of Baltimore<sup>1</sup>; that they are both atheists; that prior to the amendment of the above rule in 1960 the infant petitioner was required to attend the exercises prescribed by the rule and that since that amendment he has been excused from attend-

<sup>1</sup> At the time the suit was filed, this petitioner was a student at one public school, but it was stipulated that at the time of the argument he was a student at another public school of Baltimore, and that his change of school does not render the case moot. Cf. *Doremus v. Board of Education*, 342 U.S. 429, 432-33, where a child's graduation did render the case moot with regard to such child.



ing upon his mother's written request; that the reading of the Bible and or of the Lord's Prayer constitute a sectarian [fol. 42] exercise in the public schools of Baltimore and so contravenes the First and Fourteenth Amendments to the Constitution of the United States; that the rule, as practiced, places a premium on belief as against non-belief, that it pronounces belief in God as the source of all moral and spiritual values, equating those values with religious values, and renders "sinister, alien and suspect the beliefs and ideals of your Petitioners, promoting doubt and question of their morality, good citizenship and good faith"; and that the amendment to the rule permitting pupils to be excused upon request from the opening exercises neither negates nor mitigates the infringement of their constitutional rights; that the effect of the amendment is "merely an opportunity for exclusion" of the student petitioner from a stated school exercise which a majority of the pupils have been taught to revere, and that the exercise of that opportunity causes him "to lose caste with his fellows, to be regarded with aversion, and to be subjected to reproach and insult; and that such practice tends to destroy the equality of the pupils which the Constitution seeks to establish and protect."

The respondents demurred to the petition and their demurrer was sustained without leave to amend. Since the case comes before this Court on a ruling on demurrer, we must accept as true all well pleaded facts. *Mahoney v. Bd. of Supervisors of Elections*, 205 Md. 325, 327, 106 A. 2d [fol. 43] 927. A difficulty here (as in many other cases) is to draw a sharp line between allegations of fact and conclusions to be drawn therefrom, and the further problem arises as to whether a conclusion should be accepted as alleged, should be tested on the basis of facts of which courts may take judicial notice, or should be determined only on the basis of proof. See, for example, the several views as to an allegation of coercion expressed in the majority opinion of Mr. Justice Douglas and in the dissenting opinions of Mr. Justice Frankfurter and of Mr. Justice Jackson in *Zorach v. Clauson*, 343 U.S. 306, 311-12, 321-22, 323.

The majority and minority agree that mandamus is an appropriate remedy to enforce the rights here asserted. A



question has, however, been raised as to the standing of the petitioners to maintain the suit at all. The majority assumes, without deciding, that they have sufficient standing to do so, and those who join in this dissent are of the opinion that they do possess such standing. It may be that under *Doremus v. Board of Education*, 342 U.S. 429, the adult petitioner's interest as a taxpayer would not be sufficient, though this case seems rather closer to *Everson v. Board of Education*, 330 U.S. 1 (a taxpayer's suit distinguished in *Doremus*) because of her allegations with regard to the violation of her convictions by the practice complained of. Cf. *Baker v. Carr*, 369 U.S. 187 (decided March 26, 1962) upholding standing of voters to sue for redress of asserted malapportionment of representation in a state legislature. See also Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 Harv. L. Rev. 1265, esp. pp. 1298-99 and comment on *Everson* and *Doremus*, pp. 1310-11. In any event, the mother's interest as a parent and her son's own interest appear to be clearly sufficient under *McCullum v. Board of Education*, 333 U.S. 203, and *Zorach v. Clauson*, 343 U.S. 306, 309 (n. 4). Cf. *Board of Education v. Barnette*, 319 U.S. 624. See also *Engel v. Vitale*, 218 N.Y.S. 659, 10 N.Y.2d 174, in which none of the several opinions in the Court of Appeals of New York found, or even referred to, any want of standing on the part of the taxpayer-parents who brought suit to prevent the recital of the so called Regents' prayer in a New York public school.

The principal contention of the appellants on the merits is that the reading from the Bible (whichever version may be used) and/or the recital of the Lord's Prayer in the public schools constitute violations of the provisions of the First Amendment, made applicable to the States under the Fourteenth Amendment (*Cantwell v. Connecticut*, 310 U.S. 296), which proscribe any "law respecting an establishment of religion, or prohibiting the free exercise thereof." The determination of the case depends upon the meaning and application of the Constitution of the United States.<sup>2</sup> On

<sup>2</sup> No question is raised under the Constitution of this State. See Article 36 of the Maryland Declaration of Rights. Cf. Article 37 and *Torcaso v. Watkins*, 367 U.S. 488.

such questions this Court accepts as binding the decisions of the Supreme Court of the United States, and this is, of course, recognized by the majority of this Court in this case as well as by those of us who dissent. The rule is stated here simply because it greatly narrows the matters pertinent to the decision of this case. It would be merely a fruitless exercise in legal history for us to present one more re-examination of the origins and meaning of the religious freedom provisions of the First Amendment, if, [fol. 45] as we think, the decisions of the Supreme Court conclude the question to be decided. In *Everson v. Board of Education*, *supra*, 330 U.S. at 15-16, Mr. Justice Black, writing for the majority, said in part:

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'"

The dissents in that case did not challenge this interpretation of the coverage of the First Amendment as being too broad, but thought it was applied too narrowly to the facts of that case.

In *McCollum v. Board of Education*, 333 U.S. 203, the Supreme Court adhered to *Everson* and held invalid under

the First Amendment the Illinois "released time" program for religious education in the public schools of Champaign. Such instruction was given on school property and on-school time by representatives of several different faiths. Students who did not wish to take such instruction were excused from attendance, but were required to pursue secular studies in some other part of the school building. Students released from secular studies were required to be present at the religious classes, and reports of their presence or absence were to be made to their secular teachers. There were present in *McCullum* both the use of tax-supported property for religious purposes and close cooperation between school authorities and the local religious council in promoting religious education. The majority opinion, written by Mr. Justice Black, stated, in part (333 U.S. at 209-10):

"The operation of the State's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment . . . as we interpreted it in *Everson v. Board of Education*, 330 U.S. 1."

Mr. Justice Frankfurter, who had dissented in *Everson*, filed an opinion in which Mr. Justice Jackson, Mr. Justice Rutledge, and Mr. Justice Burton, who had also dissented in *Everson*, joined, stating the view that the Illinois released time program there involved was invalid under the First Amendment. In it he said (333 U.S. at 213): "We are all agreed that the First and Fourteenth Amendments have a secular reach far more penetrating in the conduct of Government than merely to forbid an 'established church.'" This view was recently reiterated by the Supreme Court in *Torcaso v. Watkins*, 367 U.S. 488, at 493-94, in reversing

[fol. 47] a judgment of this Court.<sup>3</sup> In *McCullum*, Mr. Justice Jackson filed a separate concurring opinion in which he expressed agreement with the opinion of Mr. Justice Frankfurter and also concurred in the result reached by the Court. He expressed some reservations. First, he questioned whether the facts of the case established jurisdiction in the Supreme Court, and second, he thought that the Supreme Court should place some bounds on the demands for interference with local schools which that Court is empowered or willing to entertain. Mr. Justice Reed alone dissented.

In *Doremus v. Board of Education*, 5 N.J. 435, 75 A. 2d 880, appeal dismissed, 342 U.S. 429, the New Jersey Supreme Court upheld a statute of that State providing for the reading, without comment, of five verses of the Old Testament at the opening of each public-school day. The Supreme Court of the United States dismissed an appeal from that judgment because of the lack of standing of the appellants to maintain the suit. One appellant was a parent of a child who had graduated, and the case was held moot with respect to that child. The claims of the appellants as taxpayers were held insubstantial and insufficient. Mr. Justice Douglas, with whom Mr. Justice Reed and Mr. Justice Burton agreed, dissented as to the latter holding and thought that the case should have been decided on the merits. The majority opinion intimated doubt as to whether [fol. 48] the allegations of the complaint showed injury to the child (who had by then graduated) while she was a student, pointing out that there was "no assertion that she was injured or even offended" [by the Bible reading] or that she was compelled to accept, approve or confess any dogma or creed or even to listen when the Scriptures were read" and also that there was a stipulation that any child could be excused, at his or her parents' request, from the Bible reading and that no such request had been made. 342 U.S. at 432. The Supreme Court did not, however, rest its dismissal of the appeal of the parent of this child on any ground other than mootness.

<sup>3</sup> The opinion was written by Mr. Justice Black and six of the other members of the Court joined in it. Mr. Justice Frankfurter and Mr. Justice Harlan concurred in the result.

In *Zorach v. Clauson*, *supra*, the New York "released time" program for religious education for public school students was upheld. Attendance was not compulsory and the religious instruction was not given in school buildings nor was any public expense involved. Students were released on written request of their parents to leave the school premises to receive religious instruction or join in devotional exercises at religious centers, and reports of their attendance were furnished to school authorities by the religious bodies. Students not released to attend religious instruction or observances were required to remain in their classrooms. In the opinion of the Court in *Zorach*, Mr. Justice Douglas made the often-repeated statement relied upon by the majority of this Court in this case and by this Court in *Torcaso v. Watkins*, 223 Md. 49, 162 A. 2d [fol. 49] 438, *reversed*, 367 U.S. 488, that "We are a religious people whose institutions presuppose a Supreme Being." 343 U.S. at 313. The Court held, over vigorous dissents by Mr. Justice Black, Mr. Justice Frankfurter and Mr. Justice Jackson, that there was no violation of the principle of separation of church and state and that under the New York released time plan "the public schools do no more than accommodate their schedules to a program of outside religious instruction." The Court then added: "We follow the *McCollum* case." *Id.* at 315.

Because of the different result in *Zorach* from that in *McCollum*, there was belief (shared by this Court in *Torcaso*) that *Zorach* marked a retraction from *McCollum*. Since the decision of *Torcaso* by the Supreme Court there can hardly be any basis for such a continued interpretation of *Zorach*. The "wall of separation" between church and state recognized by both the majority and the dissenters in *Ererson*, and described as "high and impregnable" in *McCollum* (to which case the Court expressed its adherence in *Zorach*), remains as high and impregnable as ever under *Torcaso*. (Cf. *McGowan v. Maryland*, 366 U.S. 429, and companion cases, *Gallagher v. Crown Kasher Super Market*, 366 U.S. 617; *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582; and *Braunfeld v. Brown*, 366 U.S. 599.

There seems to be no substantial room for dispute that the reading of passages from the Bible and the recital of



[fol. 50] the Lord's Prayer are Christian religious exercises.' This being so, the inclusion of such a reading or recital in the opening exercises of the public schools seems plainly to favor one religion and to do so against other religions and against non-believers in any religion. This, I think, is directly contra to the prohibition against any "law respecting an establishment of religion," contained in the First Amendment, as that provision has been interpreted by the Supreme Court. See the *Everson*, *McCullum*, *Torcaso* and *McGowan* cases, all cited above. I find nothing inconsistent with the broad interpretation therein set forth in either *Doremus* or *Zorach*. I have already quoted from *Torcaso* as to the penetrating reach of the First Amendment. In *McGowan*, the Chief Justice said in the opinion of the Court (366 U.S. at 441-42): "But, the First Amendment, in its final form, did not simply bar a congressional enactment *establishing a church*; it forbade *all laws respecting an establishment of religion*. Thus, this Court has given the Amendment a 'broad interpretation' . . . in the light of its history and the evils it was designed forever to suppress." The Court then cited *Everson*, 330 U.S. at 14-15 and cited and briefly discussed *McCullum* as holding the religious instruction program there involved "to be contrary to the 'Establishment' Clause." The religious exercises here prescribed seem to me no less so. Here we are dealing not merely with released time, but [fol. 51] with a prescribed religious exercise conducted by public school officials in public schools of the State, attendance at which schools (with exceptions not here important) is required (Code, (1957), Art. 77, Sec. 231), during school time and in school buildings. Granting that the use of school buildings is not a determinative factor in distinguishing *McCullum* and *Zorach*, I think that, if present, it is a relevant factor in determining whether the State is lending its aid to promoting religion. There is, I think, a marked difference between an accommodation of the public school schedule to religious instruction and the inclusion of religious exercises in public school ceremonies.

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\* If the exercises were confined to reading from the Old Testament, they would be both Jewish and Christian, but still religious



I think that here the State is lending its aid to religion and that *McCullum* is controlling.

The fact that individual students, or theoretically all students, may be excused from attendance at these exercises does not, in my estimation, save the rule from collision with the "establishment of religion" clause of the First Amendment, even if it could save it from collision with the "free exercise of religion" clause. The coercive or compulsive power of the State is exercised at least to the extent of requiring pupils to attend school and it requires affirmative action to exempt them from participation in these religious exercises.

This conclusion is in accord with the result reached by a special three-judge District Court in Pennsylvania in *Schempp v. School District of Abington Township*.

F. Supp. , decided February 1, 1962. The opinion was written by Biggs, C. J., after remand of the case by the Supreme Court (364 U.S. 298) following the amendment of the Pennsylvania statute *pendente lite* so as to provide for pupils to be excused upon the written request [fol. 52] of a parent or guardian from attending the reading, without comment, of ten verses from the Bible, such reading still being made compulsory in public schools of that Commonwealth.

I have carefully considered the case of *Engel v. Vitale*, *supra*, 10 N.Y. 2d 174, 218 N.Y.S. 2d 579, in which five of the Judges of the Court of Appeals of New York concurred in upholding the reading in a public school of that State of the so called "Regents' Prayer". There, as in the instant case and in *Schempp*, there were provisions for students to be excused from the exercises at which the prayer was required to be said. I find the dissenting opinion of Judge Dye, in which Judge Fuld concurred, more persuasive than the majority views. The majority seems to me to do as this Court did in *Torcaso* in placing too much reliance on the result of *Zorach* and the oft-quoted statement that "We are a religious people whose institutions presuppose a Supreme Being." The opinion of Justice Dye interprets the decisions of the Supreme Court substantially as I have endeavored to do in this dissent.

Despite the provisions for excuse from attending these religious exercises, two further questions relating to coercion (apart from what might be called the general coercion already considered in connection with the "establishment of religion" clause) still remain. One is whether or not there is coercion upon the individual student by reason of his incurring suspicions and losing caste with his fellows, as alleged in the petition. The other is whether or not there [fol. 53] is compulsion upon the student or his parent requesting that he be excused, or upon both, to profess disbelief in any religion.

As to the first of these questions it seems to me that under our ordinary rules of pleading, the allegations of the petition are not so insubstantial as to be brushed aside as mere conclusions of the pleader, and that they are sufficient on demurrer. The Supreme Court has recognized in *Brown v. Board of Education*, 347 U.S. 483, in applying the Fourteenth Amendment, that psychological effects upon children may be of vital importance. Such factors are alleged here, and as the case now stands they are admitted by the demurrer.

With regard to the second question stated—requiring a profession of disbelief—the situation here seems to be the converse of *Torcaso*. There the Supreme Court struck down the provision of the Constitution of this State requiring as a condition of holding an office of public trust that the person elected or appointed thereto declare his belief in the existence of God. Here, since attendance at these religious exercises is compulsory, unless a written parental excuse is filed, what amounts to a profession of disbelief in the religion to which they pertain is required of the parent and perhaps also of the child, at the peril of the child being subjected to the pressure alleged or of the parent and the child, too, if he is old enough to comprehend and share his parents' views respecting religion, [fol. 54] subordinating or abandoning their convictions. Cf. *Talley v. California*, 362 U.S. 60, involving a freedom of speech question. Neither a profession of belief, nor of disbelief may be required.

These considerations illustrate the intermeshing of the "establishment of religion" and of the "free exercise"

clauses of the First Amendment. Hesitancy to expose a child to the suspicions of his fellows and to losing caste with them, will tend to cause the surrender of his and his parents' religious or non-religious convictions and will thus tend to put the hand of the State into the scales on the side of a particular religion, which is supported by the prescribed exercises. *Torcaso* quoted from *Everson* with regard to the meaning of the establishment clause; it also explicitly held that the provision which was there condemned "invades the appellant's freedom of belief and religion and therefore cannot be enforced against him." Whether *Torcaso* proceeds on one or the other or both of the religious freedom provisions of the First Amendment, it seems clear under all of the cases, including *Zorach*, that coercion is barred.

*Engel v. Vitale*, *supra*, cert. granted 368 U.S. 924, was argued on April 3, 1962, and is now awaiting determination by the Supreme Court. I believe that its decision in that case will be determinative of this. Meanwhile, I can only state my understanding of the effect of prior decisions of the Supreme Court and express my own opinion that those decisions call for a decision of this case reaching a result [fol. 55] opposite to that reached by a majority of this Court.

Judge Henderson and Judge Prescott have authorized me to say that they join in this dissent.

[fol. 56]

## IN THE COURT OF APPEALS OF MARYLAND

No. 90, September Term, 1961

WILLIAM J. MURRAY, III, Infant, etc., et al.,

v.

JOHN N. CURLETT et al. and BOARD OF SCHOOL COMMISSIONERS  
OF BALTIMORE CITY.

Appeal from the Superior Court of Baltimore City.

Filed: May 26, 1961.

December 20, 1961: Order of Court filed setting case for reargument during January session on constitutional question involved.

April 6, 1962: Judgment affirmed; appellants to pay the costs. Op. Horney, J. Brune, C.J. dissents and files dissenting opinion, in which Henderson and Prescott, J.J. concur.

## DOCKET ENTRIES

## STATEMENT OF COSTS:

## In Circuit Court:

Record	\$25.00
Stenographer's Costs	—

## In Court of Appeals:

Filing Record on Appeal .....	\$ 20.00
Printing Brief for Appellant .....	220.16
Reply Brief .....	
Portion of Record Extract—Appellant .....	
2 Appearance Fees—Appellant .....	20.00
Printing Brief for Appellee .....	234.55
Portion of Record Extract—Appellee .....	
2 Appearance Fees—Appellee .....	20.00

[fol. 57] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 58]

## SUPREME COURT OF THE UNITED STATES

[Title omitted]

## ORDER ALLOWING CERTIORARI—October 8, 1962

The petition herein for a writ of certiorari to the Court of Appeals of the State of Maryland is granted.

• And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Goldberg took no part in the consideration or decision of this petition.

Office Supreme Court, U.S.  
FILED

MAY 15 1962

JOHN F. DAVIS, CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1962

No. [REDACTED] 119

**WILLIAM J. MURRAY III, INFANT, BY MADALYN E.  
MURRAY, HIS MOTHER AND NEXT FRIEND, AND  
MADALYN E. MURRAY, INDIVIDUALLY,**

*Petitioners,*

VS.

**JOHN N. CURLETT, PRESIDENT, SAMUEL EPSTEIN, MRS.  
M. RICHMOND FARRING, ELI FRANK, JR., DR.  
ROGER HOWELL, HENRY P. IRR, DR. WILLIAM  
D. McELROY, MRS. ELIZABETH MURPHY PHIL-  
LIPS, JOHN R. SHERWOOD, INDIVIDUALLY, AND CON-  
STITUTING THE BOARD OF SCHOOL COMMIS-  
SIONERS OF BALTIMORE CITY,**

*Respondents.*

**PETITION FOR A WRIT OF CERTIORARI TO THE  
COURT OF APPEALS OF MARYLAND**

**LEONARD J. KERPELMAN,  
900 Light Street,  
Baltimore 30, Maryland.  
Attorney for Petitioner.**



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1961

No. \_\_\_\_\_

WILLIAM J. MURRAY III, INFANT, BY MADALYN E.  
MURRAY, HIS MOTHER AND NEXT FRIEND, AND  
MADALYN E. MURRAY, INDIVIDUALLY,  
*Petitioners.*

VS.

JOHN N. CURLETT, PRESIDENT, SAMUEL EPSTEIN, MRS.  
M. RICHMOND FARRING, ELI FRANK, JR., DR.  
ROGER HOWELL, HENRY P. IRR, DR. WILLIAM  
D. McELROY, MRS. ELIZABETH MURPHY PHIL-  
LIPS, JOHN R. SHERWOOD, INDIVIDUALLY, AND CON-  
STITUTING THE BOARD OF SCHOOL COMMIS-  
SIONERS OF BALTIMORE CITY,

*Respondents.*

**PETITION FOR A WRIT OF CERTIORARI TO THE  
COURT OF APPEALS OF MARYLAND**

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland entered in the above-entitled cause on April 6, 1962, affirming the judgment of the Superior Court of Baltimore City entered April 27, 1961 in favor of the defendants for costs of suit (Appellants' Appendix below, p. E. 1).

### CITATIONS TO OPINIONS BELOW

The opinion of the Superior Court of Baltimore City, the court of first impression, is reported in the Daily Record (Baltimore), issue of June 12, 1961, and is set forth in the Appellants' Appendix below, pp. E. 6-E. 17.

The opinion of the Court of Appeals of Maryland is reported at Md. A. 2d, the dissenting opinion at Md. A. 2d, and these opinions are set forth in the Appendix, *infra*, starting at pages 1a and 11a, respectively.

### JURISDICTION

The final judgment of the Court of Appeals of Maryland, the court of last resort of that State, filed April 6, 1962, was entered on that same date (clerk's certificate attached hereto, *infra*, App. 22a). Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1257 (3), there having been drawn in question below, and the petitioners claiming here the matter of the validity of a statute of the State of Maryland upon the ground of its being repugnant to the First and Fourteenth Amendments to the Constitution of the United States, and the petitioners having asserted below and claiming here, denial of rights, privileges, and immunities secured by the First and Fourteenth Amendments to the Constitution of the United States. The highest court of the State of Maryland, in its decision, ruled upon these said matters of validity, and of rights, privileges, and immunities, unfavorably to the petitioners.

### QUESTIONS PRESENTED

1. Do the opening exercises for public schools provided for by, and instituted under, Section 6 of Article II of the Rules of the Board of School Commissioners of Baltimore

City, promulgated under a state statute giving the Board general supervisory powers over schools violate any constitutional right of the petitioners which is guaranteed by the "establishment" and "free exercise" clauses of the First Amendment to the Constitution of the United States as made applicable to the States by the Fourteenth Amendment, or of the "equal protection" clause of the Fourteenth Amendment?

2. Has the Rule above mentioned and the practice instituted under it in the public schools of Baltimore City by the Board of School Commissioners deprived the petitioners of rights, privileges or immunities guaranteed by the "establishment" and "free exercise" clauses of the First Amendment to the Constitution as made applicable to the States by the Fourteenth Amendment?

3. Is the decision below in conflict with the decisions of this Court concerning the free exercise of religion, the passage of laws respecting an establishment of religion, and concerning the separation of Church and State?

### **CONSTITUTIONAL PROVISIONS, STATUTES, AND ADMINISTRATIVE REGULATIONS INVOLVED**

This case involves the following:

1. A portion of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

"... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. A portion of the First Amendment to the Constitution of the United States,

"(Congress) shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;"

3. A part of Article 77, Section 203 of the Annotated Code of Maryland (Michie, 1957) (Referred to in Memorandum Opinion of the Superior Court of Baltimore City, Appellants' Appendix below, E. 7).

"The Board of Commissioners of public schools of Baltimore City, or by whatever name the body may be known that has supervisory power and control over the public schools of Baltimore City . . ." (shall have certain powers and duties).

Also Section 202 of Article 77, which is by necessary inference a part of Section 203.

"The mayor and city council of Baltimore shall have full power and authority to establish in said city a system of free public schools which shall include a school or schools for manual or industrial training; under such ordinances, rules and regulations as they may deem fit and proper to enact and prescribe; they may delegate supervisory powers and control to a Board of School Commissioners: . . ."

And also Section 91 of the Charter and Public Local Laws of Baltimore City (Flack, 1949), drawn in by inference by Sec. 202, *supra*,

"Education, Department of, General Powers and Duties. (a.) There shall be a Department of Education, the head of which shall be a Board of School Commissioners . . ."

4. Article VI, Section 6, of the Rules of the Board of School Commissioners of Baltimore City,

"Opening Exercise. Each school, either collectively or in classes, shall be opened by the reading, without



comment, of a chapter in the Holy Bible and or the use of the Lord's Prayer. The Douay version may be used by those pupils who prefer it . . ." (Appellants' Appendix below, E. 2).

Also, an amendment to the above Rule, adopted November 17, 1960 by the Board, providing that,

"Any child shall be excused from participating in the opening exercises or from attending the opening exercises upon the written request of his parent or guardian." (Appellants' Appendix below, E. 3).

5. The compulsory school attendance law of the State of Maryland as contained in Article 77 of the Annotated Code of Maryland (Michie, 1957):

"Sec. 231 (a) *Who must attend.* Every child residing in Baltimore City and in any county in the state between seven and sixteen years of age shall attend some day school regularly as defined in Sec. 233 of this article. . . . Every person having under his control a child between seven and sixteen years of age shall cause such child to attend school or receive instruction as required by this section. . . .

"(b) *Penalty.* Any person who has a child under his control and who fails to comply with any of the provisions of this section shall be deemed guilty of a misdemeanor, and be fined not exceeding five dollars for each offense."

### STATEMENT OF THE CASE

The case was heard below without testimony upon the pleadings. Extracting the facts from the pleadings (Appellants' Appendix below, pp. E. 1-E. 6), they are as follows.

Both the infant petitioner and the individual petitioner, his mother, are atheists. The infant petitioner attends the public schools of Baltimore City. The defendant School

Board is by statute charged with supervision and control of the Baltimore City public schools. Under its rule making authority the defendant Board established a rule many years ago making the conduct of a short sectarian religious ceremony mandatory at the opening of each day of school. This ceremony consists of the reading, without comment, of one chapter of the Bible "and or" recitation of the Lord's Prayer. The petitioners, who are subject to the compulsory school attendance law of the State of Maryland, before filing their action below, had requested the Board to rescind its rule and to direct that the practice of holding this daily religious ceremony be discontinued by the teachers under its control. The practice was not stopped, nor the rule changed. However, the Board did amend the rule so as to allow any pupil to be excused from attendance at the exercises upon presenting the written request of his parent or guardian. This the infant petitioner did, but thereafter, he suffered "loss of caste with his fellows, (was) regarded with aversion, and . . . subjected to reproach and insult", and was subjected to certain other substantial disadvantageous effects which followed from his exclusion from the classroom religious ceremony. Therefore, upon the religious practice being continued as before (though without the infant petitioner's presence in the classroom), the action was brought below.

#### **HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED**

The action consisted of a Petition for the Issuance of the Writ of Mandamus commanding the defendants to "rescind and cancel the Rule in question and to cause the teachers in Baltimore City to discontinue the "practice and exercises" set forth.

The petition (Appellants' Appendix below, pp. E. 1-E. 5) alleged the state citizenship and residence of the petitioners, the status of the adult petitioner as a taxpayer and of the infant petitioner as a student; that both were subject to the compulsory school attendance statute of the state; the supervisory power of the defendants over the public schools in question; the existence of the Rule as to the sectarian religious exercises, and its enforcement by the defendants to the detriment of the petitioners; the contravention of the rights of the petitioners to freedom of religion under the First and Fourteenth Amendments and the violation of the principle of separation of Church and State; the violation of the constitutional rights of the petitioners by threatening their religious liberty; the averment that the provision for being excused in no wise negated nor mitigated the violation and infringement of the petitioners' constitutional rights, and the averment of the ill effects which the infant petitioner experienced as a result of his forced choice to be excluded from the exercises; the deprivation of equality under the laws; and the request to, and the refusal of, the defendants that they cease from the religious practice protested against.

The defendants demurred to the petition on the ground that mandamus was not the proper form of action, and that the petition stated no grounds for relief. Thereby, in law, the defendants admitted the truth of all well-pleaded facts alleged in the petition. (See dissenting opinion, App. 13a *infra*).

The demurrer was sustained without leave to amend, the petition dismissed and judgment absolute for costs entered against the petitioners (Appellants' Appendix below, pp. E. 1, E. 17).

In sustaining the demurrer, the lower court ruled that mandamus was an appropriate form for the action if the

action of the Board was illegal (unconstitutional) (Appellant's Appendix below, E. 8), and then proceeded to make its ruling, purely on federal constitutional grounds. See particularly E. 10-E. 13, and E. 16-E. 17, Appellants' Appendix below, wherein the opinion of the lower court is set forth.

The lower court in addition to quoting this court in *Everson, McCollum and Zorach*, also quoted from the cases of *Engel v. Vitale*, 191 N.Y.S. 2d 453 and *Schempp v. School District*, 177 F. Supp. 398 (E.D. Pa. 1959) on federal grounds (Appellants' Appendix below, E. 15) in both of which cases further proceedings now are pending or contemplated in this court on subsequent evolvments. (*Engel v. Vitale*, No. 468, 1961-62 Docket).

In the Court of Appeals of Maryland, wherein the lower court's decision sustaining the demurrer was upheld, both the majority (4 members of the court) and the minority (3 members of the court) based its decision on federal grounds.

It was agreed by the entire court that mandamus was a proper form of action ("(T) here is no reason why the question may not be determined on a petition for writ of mandamus under such circumstances as are present in this case . . . ." (App. 4a, *infra*.) See also the dissenting opinion (App. 13a).)

The majority of the Court of Appeals of Maryland "assumed" that the petitioners had standing to sue (App. 5a), and found that the Rule and the practice complained of were constitutional.

The minority opinion stated that the majority had "assume(d) without deciding" the question of standing (App. 13a). (Had it? The petitioners here contend that it did

decide affirmatively the question of "standing".) The minority of the court decided unequivocally, and as a matter of law, that by the holdings in *Everson v. Board*, 330 U.S. 1, *Baker v. Carr*, U.S. , and particularly *McCullum v. Board*, 333 U.S. 203, *Zorach v. Clauson*, 343 U.S. 306, 309 n. 4 and other cases (App., 13a-14a) there was no question but that the interest of the petitioners was "clearly sufficient".

Both majority and minority then went on to base its decision completely on federal constitutional grounds.

In the majority opinion the court stated:

"The essential question thus presented is whether the daily Bible reading and Prayer recitation program, at which attendance is not compulsory, is a violation of the 'establishment of religion' and 'free exercise' clauses of the First Amendment (as applied to the States through the due process clause of the Fourteenth) or of the 'equal protection' clause of the Fourteenth Amendment. We think that neither constitutional provision is violated, for, as we see it, neither the First nor the Fourteenth Amendment was intended to stifle all rapport between religion and government." (App., 5a).

The court then quoted from *Zorach v. Clauson*, 343 U.S. 306 (App., 7a-8a), *Everson v. Board of Education*, 330 U.S. 1 (App., 6a), *McCullum v. Board of Education*, 333 U.S. 203 (App., 6a), *School District v. Schempp*, 364 U.S. 298 (App., 8a), *Torcaso v. Watkins*, 367 U.S. 488 (App., 9a), *McGowan v. Maryland*, 366 U.S. 420 (App., 9a) and *Brown v. Board of Education*, 347 U.S. 483 (App., 11a), all as federal constitutional bases for its affirmance of judgment.

Finally, the majority held (App., 11a), that,

"Inasmuch as the Supreme Court has not yet spoken with respect to the Bible reading and Prayer recitation



ceremonies at school opening exercises, we think we are bound by what we understand is the effect of *McCullum* as it is explained and expanded in *Zorach* until such time as the Court speaks further in this uncertain area. So, having decided that the school opening exercises in Baltimore City are not violative of either the First or Fourteenth Amendments, we hold that the demurrer as to both appellants was properly sustained.

For the several reasons stated herein, the judgment will be affirmed.

Judgment affirmed; Appellants to pay the costs."

Likewise the minority finding was almost entirely based on federal constitutional grounds.

It too relied on *Everson* (App., 14a-15a), *McCullum* (App., 15a-16a), *Torcaso v. Watkins* (App. 16a, 18a, 21a, 22a), *Zorach* (App., 17a-18a), *McGowan v. Maryland* (App., 18a, 19a) and *Brown v. Board of Education* (App., 21a), as well as *Talley v. California*, 362 U.S. 60 (App., 21a), but reached, of course, a conclusion opposite to that of the majority, and held, on federal constitutional grounds, the writer of the opinion, Judge Brune, speaking for the entire minority, that:

"I can only state my understanding of the effect of prior decisions of the Supreme Court and express my own opinion that those decisions call for a decision of this case reaching a result opposite to that reached by a majority of this Court" (App., 22a).

### REASONS FOR GRANTING THE WRIT

This is a case in which, after hearing oral argument, and then reargument, the majority of the Maryland Court of Appeals, in a four to three decision, held that "the Supreme Court has not yet spoken" (App., *infra*, 11a), and in which the minority stated "... (We can only state ... that



(prior decisions of the Supreme Court) call for a decision of this case reaching a result opposite to that reached by a majority of this Court. (App., *infra*, 22a.) Thus, the case involves federal questions of substance which, the majority of the Maryland court stated had not theretofore been determined by this court, and which the minority found had been decided by the majority in a way probably not in accord with applicable decisions of this court. All of which will, it is hoped, be persuasive as to the granting of the writ of certiorari prayed, under Supreme Court Rule 19, Sec. 1(a).

Clearly, it is felt, the case involves substantial matters upon constitutional questions, and particularly concerning the "establishment" and "free exercise" clauses of the First Amendment. Of course, the petitioners contend, along with the minority of the Maryland court, that the question was resolved by the court below in a manner in conflict with principles heretofore expressed by this court, but at the same time, it is apparent that the particular point in question, the constitutionality of the recital, in public school classrooms, of a prayer and a reading from Holy Scripture, which is acceptable to certain religious sects (albeit the majority sects), but not acceptable to others, has never specifically come before this court.

*McCollum v. Board of Education*, 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 249 and *Zorach v. Clauson*, 343 U.S. 306, 72 S. Ct. 679, 96 L. Ed. 554 each had to do with religious instruction which was aided by the public schools. In the former case it was held that released time religious instruction offered upon school premises during school hours amounted to an operation of the state's compulsory education system to assist a program of religious instruction carried on by separate religious sects, and was within

the ban of the First Amendment made applicable to the states by the Fourteenth; that the "establishment" clause was violated in that the State was "afford(ing) sectarian groups invaluable aid . . . (by) help(ing) to provide pupils for their religious classes through use of the state's compulsory public school machinery. This is not separation of Church and State." (Mr. Justice Black delivering the opinion of the Court.)

In the *Zorach* case, the students were released for religious instruction, again, during the school day, but to attend classes off of school premises. In that circumstance it was held that the First Amendment was not violated since there was no "concert or union or dependency" of Church and State, but that there was merely an "accommoda(tion of) schedules to a program of outside religious instruction" which did not fall within First Amendment prohibitions.

In the same vein, was *Everson v. Board of Education*, 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711. There it was decided that the First Amendment is not violated by a state statute providing public tax-supported bus transportation to both public and parochial schools, since the legislation in question, as applied, did no more than "provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools. . . .", while at the same time it was held that "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. (The state) has not breached it here." (Opinion of the court delivered by Mr. Justice Black.)

Also, the decision below, seems to conflict with that in the second flag salute case, *Board of Education v. Barnette*.

319 U.S. 624, 87 L. Ed. 1628, 63 S. Ct. 1178, in which it was held that a school board had no authority to compel a flag salute and pledge, and that.

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or require free citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."

"We think the action . . . invades the sphere of the intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."

The right of children to be excused from the classroom in the case of religious exercises, as in the instant case scarcely seems to even touch, much less obviate the denial of their right to have no need to "confess, by word or act their faith (in a prescribed ceremony)."

In *Torcaso v. Watkins*, 367 U.S. 488, 81 S. Ct. 1680, recently before this court, in which a test oath or religious qualification of the Maryland Constitution, requiring a declaration of belief in the existence of God of one holding the office of Notary Public was overthrown, the Court said,

"(We) decided *Everson v. Board of Education*, 330 U.S. 1, and said this at pages 15 and 16:

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs.

for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can openly or secretly participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State".

"While there were strong dissents in the *Everson* case, they did not challenge the Court's interpretation of the First Amendment's coverage as being too broad, but thought the Court was applying that interpretation too narrowly to the facts of that case. Not long afterward, in *Illinois ex rel. McCullom v. Board of Education*, 333 U.S. 203, we were urged to repudiate as dicta the above-quoted *Everson* interpretation of the scope of the First Amendment's coverage. We declined to do this, but instead strongly reaffirmed what had been said in *Everson* calling attention to the fact that both the majority and the minority in *Everson* had agreed on the principles declared in this part of the *Everson* opinion. And a concurring opinion in *McCullom*, written by MR. JUSTICE FRANKFERTER and joined by the other *Everson* dissenters, said this:

"We are all agreed that the First and Fourteenth Amendments have a secular reach far more penetrating in the conduct of Government than merely to forbid an "established church." . . . We renew our conviction that "we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion".

"The Maryland Court of Appeals, thought, and it is argued here, that this Court's later holding and opinion in *Zorach v. Clauson*, 343 U.S. 306, had in part repudi-

ated the statement in the *Everson* opinion quoted above and previously reaffirmed in *McCullum*. But the Court's opinion in *Zorach* specifically stated: "We follow the *McCullum* case," 343 U.S. at 315. Nothing decided or written in *Zorach* lends support to the idea that the Court there intended to open up the way for government, state or federal, to restore the historically and constitutionality discredited policy of probing religious beliefs by test oaths, or limiting public offices to persons who have, or perhaps more properly, profess to have a belief in some particular kind of religious concept.

"We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person to profess a belief or disbelief in any religion." Neither can constitutionally pass laws nor impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.

"In upholding the State's religious test for public office the highest court of Maryland said:

"The petitioner is not compelled to believe or disbelieve, under threat of punishment or other compulsion. True, unless he makes the declaration of belief he cannot hold public office in Maryland, but he is not compelled to hold office."

"The fact, however, that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution. This was settled by our holding in *Wieman v. Updegraff*, 344 U.S. 183."

More recently, but probably less directly to the point of defining the constitutionality of sectarian school prayer ceremonies than the above cases, is *McGowan v. Maryland*, 366 U.S. 42, 81 S. Ct. 1101, and the related cases of *Gallagher v. Crown Kosher Super Market*, 366 U.S. 617;

81 S.Ct. 1122: *Two Guys from Harrison v. McGinley*, 366 U.S. 582, 81 S. Ct. 1136; and *Braunfield v. Brown*, 366 U.S. 599, 81 S. Ct. 1144. These were "Sunday Blue Law" cases, in which, however, this court once more closely examined First Amendment prohibitions, and found that Sunday closing laws were public health and welfare statutes, and not, in intrinsic intent, an incursion into the area of religious observances by the states.

However, in the discussion of the First Amendment which the opinions in these cases covered learnedly and in great detail, (the opinions comprise 127 pages in the reports), it was held once again that

"(T)he First Amendment, in its final form, did not simply bar a congressional enactment *establishing a church*; it forbade all laws respecting an establishment of religion (Emph. the Court's.) Thus, this Court has given the Amendment a broad interpretation . . . in the light of its history and the evils it was designed forever to suppress' . . . *Everson v. Board*. . . . It has found that the First and Fourteenth Amendments afford a protection against religious establishment far more extensive than merely to forbid a national or state church. . . ."

(The Chief Justice, speaking for the Court at 366 U.S. 442.)

It might be pointed out that in *McGowan*, Mr. Chief Justice Warren, in a footnote (n. 18, at 344), quoted, with emphasis, from the dissenting opinion in *Everson*, as follows

"Hence today, apart from efforts to inject religious training or exercises and sectarian issues into the public schools, the only serious threat to maintaining that complete and permanent separation of religion and civil power which the First Amendment commands is through use of the taxing power to support religion.



*religious establishments, or establishments having a religious foundation whatever their form or special religious function.*" (The Court's italics.)

It was also held, in *McGowan*, at 442:

"(I)t is equally true that the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions."

Thus, the allegation is put forth by the defendant School Board in the instant case, and its contention is affirmed by the Maryland Court of Appeals, that the daily prayer ceremony is a permissible "regulation of conduct" as described in *McGowan v. Maryland*, while it is the position of the petitioners that in reality, the situation is that of a state government "forc(ing) or influenc(ing) a person . . . to profess a belief or disbelief in any religion", as prohibited in *Everson* and, strongly, in *Torcaso*.

But though the issue is joined, it has, at least not specifically, ever been decided by this court, or, alternatively, it has been decided in a way with which the Maryland decision below, is not in accord.

The Maryland Court in the instant case, incidentally, said that it thought it

"significant that the Supreme Court, in *School District of Abington Township v. Schempp*, 364 U.S. 298 (1960), ordered *per curiam* that the judgment below be vacated and remanded the case to the district court for further proceedings after it was learned that the Pennsylvania law had been amended so as to provide for the excusing of those students who objected to participating in a school opening ceremony quite similar to that in Baltimore City. It seems to us that the remand of this case at least indicated that the use of coercion or the lack of it may be the controlling fac-

tor in deciding whether or not a constitutional right has been denied. In reaching this conclusion we are not unmindful that the District Court . . . upon the remand . . . held . . . that the . . . statute is not constitutional . . ." (App., *infra*, 8a.)

So the Maryland Court has acted oppositely to the Pennsylvania District Court. The petitioners are informed that appeal of the *Schempp* case is contemplated.

The petitioners are also aware that *Engel v. Vitale*, No. 468, 1961-62 Docket (Cert. granted December 4, 1961) has heretofore been argued before this court on March 27, 1962. That case, however, is believed to present a somewhat narrower issue, in that the prayer involved<sup>1</sup> relates to no particular sect or establishment of religion, other than those that believe in God, while the question in this case concerns a ceremony distinctly either Christian, or Christian and Jewish in substance, and out of keeping with the religious teachings of other religious faiths.

Moreover, in stating that the use of coercion, or the lack of it, may be the deciding factor, the Maryland court overlooks the significance of *Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873. The petitioners contend that the religious discrimination present in classroom reading of the Bible, and particularly that involved in excusing or dismissing one or several children from the class during such reading would be wholly as severe in its social and psychological effects as the racial discrimination which was before the court in the segregation cases, and such segregation on a religious basis is wholly prohibited by the court's decision in the segregation cases.

<sup>1</sup> So-called "Regents prayer". The prayer is worded as follows: "Almighty God, we acknowledge our dependence on Thee, and we beg Thy blessings upon us, our parents, our teachers, and our Country."

**CONCLUSION**

Wherefore, for the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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Attorney for Petitioner.

APPENDIX

Court of Appeals of Maryland  
No. 90, September Term, 1961

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William J. Murray III, infant, etc., et al.

v.

John N. Curlett et al. and Board of School  
Commissioners of Baltimore City

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Before Brune, C.J., Henderson, Hammond, Prescott,  
Horney, Marbury and Barrett, Lester L. (specially as-  
signed), JJ.

Opinion by Horney, J.

Brune, C.J., Henderson and Prescott, JJ., dissent

Filed: April 6, 1961

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This appeal presents the question of whether the daily opening exercises of the Baltimore City public schools—wherein the Holy Bible is read and the Lord's Prayer is recited—violate the constitutional rights of a student and his mother who claim they are atheists.

The judgment appealed from is one for costs entered by the lower court after it had sustained without leave to amend the demurrer of the appellees (the Board of School Commissioners of Baltimore City and the president and other individual members thereof constituting the "Board") to the petition of the appellants (William J. Murray, III, the "student," and Madalyn E. Murray, the "mother" or "parent") for a writ of mandamus. The writ was sought to compel the Board to "rescind and cancel" a rule (and a recent amendment of it) adopted by the Board in 1965, pursuant to the power and authority con-

ferred on it by the State, concerning the opening exercise program in the public schools. The rule and amendment attacked is designated as § 6 of Article VI of the Rules of the Board, and reads as follows:

"Section 6 — Opening Exercises. Each school, either collectively or in classes, shall be opened by the reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer. The Douay version may be used by those pupils who prefer it. Appropriate patriotic exercises should [also] be held as a part of the general opening exercise of the school or class. *Any child shall be excused from participating in the opening exercises or from attending the opening exercises upon written request of his parent or guardian.*

The italicized portion of the rule was added by an amendment on November 17, 1960, in order to comply with an opinion rendered by the Attorney General (C. Ferdinand Sybert, now a member of this Court) at the request of the State Superintendent of Schools following a protest by the appellants to the effect that to require the atheistic student to attend the daily exercises was to compel him to participate in a religious training program that was offensive to him.

The petition, in addition to stating that the fourteen year old boy is a student in a public school and that the parent is a resident and taxpayer, further states that the practice under the rule had been to read from the King James version of the Bible and that the student, until the adoption of the amendment, was "required and compelled" to attend the reading program and to recite the Lord's Prayer, but that when the amendment was made he was excused at the request of his mother from further attendance.

The petitioners, in contending that the mandatory rule contravenes their freedom of religion under the first and fourteenth amendments in that it violates the principle of

separation between church and state, claim that the enforcement of the rule "threatens their religious liberty" in one way or another; that the rule "subjects their freedom of conscience to the rule of the majority"; and that the rule, by equating moral and spiritual values with religious values has thereby rendered their beliefs and ideals "sinister, alien and suspect" which tends to promote "doubt and question of their morality, good citizenship and good faith."

It is further claimed that the amendment excusing the student from participating in or attending the opening program "in no wise negates or mitigates the violation and infringement of their constitutional rights"; that the exclusion of the student has caused him to lose caste, to be regarded with aversion, and to be subjected to reproach and insult; and that the practice "tends to destroy the equality of the pupils" and place him in a disadvantageous position with respect to other pupils.

In conclusion, the petitioners state that although they have requested a cessation of the practice, the use of the rule has not ceased, but has been continued, and that they are thereby harmed.

The Board demurred to the petition on the ground that it did not state a good cause of action for which relief could be granted by way of mandamus. The lower court sustained the demurrer and dismissed the petition without leave to amend. In its memorandum opinion, the court stated two reasons for the action taken. The ultimate decision was based on the theory that the Board, in requiring that the Holy Bible be read or the Lord's Prayer be recited each school day as a part of the opening exercises, with a proviso that objecting students could be excused, was acting in the exercise of discretionary power that the issuance of a writ of mandamus could not stay. But prior to

<sup>1</sup> The petitioners also contended that the rule was contrary to the provisions of the Code (1957), Art. 77, § 203, proscribing the selection of textbooks of "a sectarian or partisan character," but, other than stating in their brief that they objected to the conduct of religious teachings, whether sectarian or non-sectarian, in public schools, they did not pursue this contention on appeal.



that, the court had found that the facts alleged in the petition for the writ did not "spell out any violation" of the constitutional rights of the petitioners.

Arguments in this case were heard twice. The initial argument was heard by five of the seven judges of this Court on both questions presented by the appeal: (i) whether mandamus is a proper action in which to test the constitutionality of the school board rule; and (ii) whether the provisions of the regulation under attack violate a constitutional right of the petitioners. The reargument was heard by seven judges, one of whom was substituting for Judge Sybert, and in the order directing reargument, we limited the reargument to the constitutional questions raised by the petition. We were then of the opinion and we now hold that where the performance of a duty prescribed by law depends on whether the statute or regulation is constitutional or invalid, there is no reason why the question may not be determined on a petition for a writ of mandamus under such circumstances as are present in this case. *Welch v. Swasey*, 79 N.E. 745 (Mass. 1907); 38 Corpus Juris, *Mandamus*, § 681b(1); 16 C.J.S., *Constitutional Law*, § 95. See also *High's Extraordinary Legal Remedies* (3rd ed.), § 332b, p. 325, where, in citing *State v. District Board*, 76 Wis. 177 (1890), it is said that "[m]andamus will lie against a board intrusted with the management of public schools to compel them to discontinue the reading of the Bible in such schools." Moreover, there are a number of decisions in this state where the courts without challenge as to the propriety thereof have proceeded to determine a constitutional question preliminary to the grant or refusal of a writ of mandamus. See, for example, *University v. Murray*, 169 Md. 478, 182 Atl. 590 (1936); *Williams v. Zimmerman*, 172 Md. 563, 192 Atl. 353 (1937); *Torcaso v. Watkins*, 223 Md. 49, 162 A. 2d 438 (1960), reversed (on another ground and decided on merits), 367 U. S. 488 (1961).

The principal question is whether the demurrer was properly sustained. The appellees contend preliminarily that the petitioners have not shown they have standing to

challenge the rule and the practice under it in the schools of Baltimore City.

If the petitioners lacked standing to sue, this would require affirmance even though the rule and the practice were unconstitutional. Since we find them to be constitutional, we shall assume the petitioners had standing to sue and proceed to discuss the reasons for our views as to constitutionality.

The essential question thus presented is whether the daily Bible reading and Prayer recitation program, at which attendance is not compulsory, is a violation of the "establishment of religion" and "free exercise" clause of the First Amendment (as applied to the States through the due process clause of the Fourteenth) or of the "equal protection" clause of the Fourteenth Amendment. We think that neither constitutional provision is violated, for, as we see it, neither the First nor the Fourteenth Amendment was intended to stifle all rapport between religion and government.

"We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe."

Thus spoke Justice Douglas (at p. 313) in the majority opinion in *Zorach v. Clauson*, 343 U.S. 306 (1952).

The Supreme Court of the United States has not yet passed on either of the constitutional questions posed by this appeal. Yet, there are several decisions concerning the separation of Church and State which we think point the way and clearly indicate that a public school opening exercise such as this one — where the time and money spent on it is inconsequential — does not violate the religious clauses of the First Amendment or the equal protection clause of the Fourteenth Amendment, as would the teaching of a sectarian religion in a public school on school time and at public expense.

The first of the cases we have in mind is *Everson v. Board of Education*, 330 U.S. 1 (1947), where the Court, though it recognized that the clause against the establishment of religion was intended to erect "a wall of separation between church and state," held that the reimbursement of parents for the cost of transporting their children to parochial and public schools by bus did not violate the "establishment of religion" clause of the First Amendment because the purpose of the New Jersey statute was to provide safe transportation in the general public welfare.

In *McCormack v. Board of Education*, 333 U.S. 203 (1948), however, where the Illinois public schools and the machinery for compelling attendance thereat were used by sectarian teachers to give religious instruction in such public schools to those pupils who were required to attend the religious classes at the request of their parents, while the other pupils (who were not attending the religious classes) were compelled to attend secular classes instead of being released, the Court held in no uncertain terms that such practices fell "squarely under the ban of the First Amendment (made applicable to the States by the Fourteenth)."

And four years later in *Zorach v. Clauson*, *supra*, the Court, though following the *McCormack* case, distinguished

it nevertheless by stating that a "released time" program of a type different from that involved in *McCullum* was not unconstitutional. In New York the public schools are permitted to release students during school hours on the request of parents to go to classes off school premises for religious instruction, but those who are not so released stay on in public school classrooms. In holding that the program did not violate the First Amendment through the Fourteenth, the Court, after noting that the program did not involve religious instruction in public schools or the expenditure of public funds, nor the use of coercion to require public school students to go to religious classrooms, went on to point out (at p. 312) that if the First Amendment "in every and all respects" required a separation of Church and State, then:

"Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'so help me God' in our courtroom oaths — these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: 'God save the United States and this Honorable Court.'"

This then may well be the key to the difficult problem with which we are confronted.

We think there is little doubt that a decision in this case lies somewhere between the decision in *McCullum* and that in *Zorach*. In the *McCullum* case, where the "tax-established and tax-supported public school system [was utilized] to aid religious groups to spread their faith," the released time program was unconstitutional. And, in the *Zorach* case, where the public schools did no more than "accommodate their schedules to a program of outside religious instruction," the program was constitutional. It is to be noted, however, that both pro-

grams were conducted during school hours, though one involved the use of state funds and the other was at the expense of the churches. But, here, where the use of school time and the expenditure of public funds is negligible, we think the daily opening exercises of the schools in Baltimore City are in the same category as the opening prayer ceremonies in the Legislature of this State and in the Congress of the United States, in the public meetings and conventions which are opened with prayers or supplications to God, and in the formal call of court sessions by the crier in State and Federal courts. For these reasons, and particularly because the appellant-student in this case was not compelled to participate in or attend the program he claims is offensive to him, we hold that the opening exercises do not violate the religious clauses of the First Amendment.

With regard to the effect of having been excused from attending the opening exercises, we think it is significant that the Supreme Court, in *School District of Abington Township v. Schempp*, 364 U.S. 298 (1960), ordered *per curiam* that the judgment below be vacated and remanded the case to the district court for further proceedings, after it was learned that the Pennsylvania law had been so amended as to provide for the excusing of those students who objected to participating in a school opening ceremony quite similar to that in Baltimore City. It seems to us that the remand of this case at least indicated that the use of coercion or the lack of it may be the controlling factor in deciding whether or not a constitutional right has been denied. In reaching this conclusion we are not unmindful that the District Court for the Eastern District of Pennsylvania has, upon the remand, reheard the case, and again held (in an opinion by John Biggs, Jr., Circuit Judge, reported in *F. Supp. 2d* [1962]) that the Pennsylvania statute is not constitutional, despite the fact that objecting students could have been excused on the request of their parents, but we do not find the decision on remand persuasive and decline to follow it. Moreover, we think it is clear that the case at bar is not



governed by the *McCullum* case on the question of compulsory participation, even though *McCullum* was "followed" in *Zorach* as well as in *Torcaso* on the "separation of church and state" point. In *McCullum*, there was a degree of compulsion, but in this case, as in *Zorach*, all compulsion has been removed so far as attendance of the appellant-student at the opening exercises is concerned.

Furthermore, we are not convinced that *Torcaso v. Watkins* (367 U.S. 488) has any bearing on our problem. True, it is a case involving the separation of church and state, but we think it is clearly distinguishable from the instant case. There, in holding that "neither a State nor the Federal Government can constitutionally force a person to profess a belief or disbelief in any religion," the Court went on to say (at p. 495) that the fact "that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by a state-imposed criteria forbidden by the Constitution." In that case the Court was concerned with the compulsion which required a non-believer to profess a belief in God in order to qualify for public office. The present case, however, as has been pointed out, is completely devoid of any compulsion or coercion to attend the school opening exercises. Nor do we find any sustenance for the appellant-student in the Sunday Blue Law cases, including *McGowan v. Maryland*, 366 U.S. 420 (1961), which was cited at the reargument.

The Bible reading and Prayer recitation programs in the public schools of other states, at which attendance was not compulsory, have been held to be valid by the appellate courts of such states. In an early case, *Church v. Bullock*, 109 S.W. 115 (Tex. 1908), the Court, in upholding a resolution stipulating that students should be present at, but were not required to participate in, the public school exercises in which the Bible was read and the Lord's Prayer was recited, held that the program did not contravene the constitutional provision against the use of public funds to support sectarian religion. In the case of *People ex rel Vollmar v. Stanley*, 225 Pac. 610 (Colo. 1927), the Court,



although stating that children could not be required against the will of their parents to attend the reading of the Bible in public schools, nevertheless held that the Bible reading ceremony could not be prohibited altogether. In a comparatively recent case, *Doremus v. Board of Education*, 75 A. 2d 880 (N.J. 1950), appeal dismissed 342 U.S. 429 (1952), the Supreme Court of New Jersey, in observing that the First Amendment did not prohibit the recognition of God, held that the noncompulsory practice of reading the Bible and reciting the Lord's Prayer, in conformity with the applicable statute, did not constitute the establishment of religion or prohibit the free exercise thereof. And the recent case of *Engel v. Vitale*, 10 N.Y. 2d 176, 218 N.Y.S. 2d 659 (1961), presently pending in the Supreme Court of the United States, the Court of Appeals of New York affirmed by a divided court a decision of the Appellate Division (206 N.Y.S. 2d 183) holding that the noncompulsory daily recitation of the "regents prayer" in the public schools was not violative of either the state or federal guarantee of freedom of religion. See also *Donahoe v. Richards*, 38 Me. 379 (1854); *Moore v. Monroe*, 20 N.W. 475 (Iowa 1884); *Pfeiffer v. Board of Education*, 77 N.W. 250 (Mich. 1898); *Billiard v. Board of Education*, 76 Pac. 422 (Kan. 1904); *Hackett v. Brooksville Graded School District*, 87 S.W. 792 (Ky. 1905); *Wilkerson v. City of Rome*, 110 S.E. 895 (Ga. 1922); *Kaplan v. Independent School District*, 214 N.W. 18 (Minn. 1927); and *Lewis v. Board of Education*, 285 N.Y.S. 164 (N.Y. Misc.), modified 286 N.Y.S. 174 (App. Div.), rehearing denied 288 N.Y.S. 751 (App. Div.), appeal dismissed 12 N.E. 2d 172 (Ct. of Apls. 1937), for other cases that have sustained the reading of the Bible and the recitation of prayers, including the Lord's Prayer, in public schools. And see the annotation in 45 A.L.R. 2d 742.

\* This prayer which is recited following the pledge of allegiance to the flag at the beginning of each school day is worded as follows: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."

We come now to the other constitutional question as to whether the appellant-student has been denied the equal protection of the laws guaranteed to him by the Fourteenth Amendment. He relies on *Brown v. Board of Education*, 347 U.S. 483 (1954), declaring as unconstitutional the segregation of the races in public schools, to support the theory that his self-exile from the opening exercises is having a deleterious effect on his relationship with other students in the school. The short answer to this claim is that the equality of treatment which the Fourteenth Amendment affords cannot and does not provide protection from the embarrassment, the divisiveness or the psychological discontent arising out of non-conformance with the mores of the majority. Cf. Footnote 7 to *Zorach v. Clauson*, *supra*, at p. 311 of 343 U.S. And see *Engel v. Vitale*, 191 N.Y.S. 2d 453 (Spec. Term 1959). We hold that the opening exercises do not violate the equal protection clause of the Fourteenth Amendment.

Inasmuch as the Supreme Court has not yet spoken with respect to the Bible reading and Prayer recitation ceremonies at school opening exercises, we think we are bound by what we understand is the effect of *McCullum* as it is explained and expanded in *Zorach* until such time as the Court speaks further in this uncertain area. So, having decided that the school opening exercises in Baltimore City are not violative of either the First or Fourteenth Amendments, we hold that the demurrer as to both appellants was properly sustained.

For several reasons stated herein, the judgment will be affirmed.

JUDGMENT AFFIRMED; APPELLANTS  
TO PAY THE COSTS.

BRUNE, C. J., dissenting.

This suit for a writ of mandamus brought by a minor through his mother as next friend and by his mother as such and as a taxpayer seeks to bar from the public schools of the City of Baltimore "the reading, without comment, of a chapter in the Holy Bible and or the use of the Lord's

Prayer." Such reading from the Bible and or use of the Lord's Prayer are required, either collectively or in classes, as a part of the opening exercise in the public schools of Baltimore under a rule of the Board of School Commissioner of that City adopted in 1905 and amended in November, 1960 by adding this provision: "Any child shall be excused from participating in the opening exercises upon the written request of his parent or guardian." The respondents in the suit are (or were) the members of the Board of School Commissioners of Baltimore City.

The petitioners allege *inter alia*: that the minor petitioner is a student at one of the public schools of Baltimore; that they are both atheists; that prior to the amendment of the above rule in 1960 the infant petitioner was required to attend the exercises prescribed by the rule and that since that amendment he has been excused from attending upon his mother's written request; that the reading of the Bible and or of the Lord's Prayer constitute a sectarian exercise in the public schools of Baltimore and so contravenes the First and Fourteenth Amendments to the Constitution of the United States; that the rule, as practiced, places a premium on belief as against non-belief, that it pronounces belief in God as the source of all moral and spiritual values, equating those values with religious values, and renders "sinister, alien and suspect the beliefs and ideals of your Petitioners, promoting doubt and question of their morality, good citizenship and good faith"; and that the amendment to the rule permitting pupils to be excused upon request from the opening exercises neither negates nor mitigates the infringement of their constitutional rights; that the effect of the amendment is "merely an opportunity for exclusion" of the student petitioner from a stated school exercise which a majority of the pupils have been taught to

<sup>1</sup> At the time the suit was filed, this petitioner was a student at one public school, but it was stipulated that at the time of the argument he was a student at another public school of Baltimore, and that his change of school does not render the case moot. Cf. *Doremus v. Board of Education*, 342 U.S. 429, 432-33, where a child's graduation did render the case moot with regard to such child.

revere; and that the exercise of that opportunity causes him "to lose caste with his fellows, to be regarded with aversion, and to be subjected to reproach and insult; and that such practice tends to destroy the equality of the pupil which the "Constitution seeks to establish and protect."

The respondents demurred to the petition and their demurrer was sustained without leave to amend. Since the case comes before this Court on a ruling on demurrer, we must accept as true all well-pleaded facts. *Mahoney v. Bd. of Supervisors of Elections*, 205 Md. 325, 327, 106 A. 2d 927. A difficulty here (as in many other cases) is to draw a sharp line between allegations of fact and conclusions to be drawn therefrom, and the further problem arises as to whether a conclusion should be accepted as alleged, should be tested on the basis of facts of which courts may take judicial notice, or should be determined only on the basis of proof. See, for example, the several views as to an allegation of coercion expressed in the majority opinion of Mr. Justice Douglas and in dissenting opinions of Mr. Justice Frankfurter and of Mr. Justice Jackson in *Zorach v. Clauson*, 343 U.S. 306, 311-12, 321-22, 323.

The majority and minority agree that mandamus is an appropriate remedy to enforce the rights here asserted. A question has, however, been raised as to the standing of the petitioners to maintain the suit at all. The majority assumes, without deciding, that they have sufficient standing to do so, and those who join in this dissent are of the opinion that they do possess such standing. It may be that under *Doremus v. Board of Education*, 342 U.S. 429, the adult petitioner's interest as a taxpayer would not be sufficient, though this case seems rather closer to *Everson v. Board of Education*, 330 U.S. 1 (a taxpayer's suit distinguished in *Doremus*) because of her allegations with regard to the violation of her convictions by the practice complained of. Cf. *Baker v. Carr*, U.S. (decided March 26, 1962) upholding standing of voters to sue for redress of asserted malapportionment of representation in a state legislature. See also Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 Harv. L. Rev. 1265, esp.

pp. 1298-99 and comment on *Everson* and *Doremus*, pp. 1310-11. In any event, the mother's interest as a parent and her son's own interest appear to be clearly sufficient under *McCollum v. Board of Education*, 333 U.S. 203, and *Zorach v. Clauson*, 343 U.S. 306, 309 (n. 4). Cf. *Board of Education v. Barnette*, 319 U.S. 624. See also *Engel v. Vitale*, 218 N.Y.S. 659, 10 N.Y. 2d 174, in which none of the several opinions in the Court of Appeals of New York found, or even referred to, any want of standing on the part of the taxpayer-parents who brought suit to prevent the recital of the so called Regents' prayer in a New York public school.

The principal contention of the appellants on the merits is that the reading from the Bible (whichever version may be used) and or the recital of the Lord's Prayer in the public schools constitute violations of the provisions of the First Amendment, made applicable to the States under the Fourteenth Amendment (*Cantwell v. Connecticut*, 310 U.S. 296), which proscribe any "law respecting an establishment of religion, or prohibiting the free exercise thereof." The determination of the case depends upon the meaning and application of the Constitution of the United States.<sup>2</sup> On such questions this Court accepts as binding the decisions of the Supreme Court of the United States, and this is, of course, recognized by the majority of this Court in this case as well as by those of us who dissent. The rule is stated here simply because it greatly narrows the matters pertinent to the decision of this case. It would be merely a fruitless exercise in legal history for us to present one more re-examination of the origins and meaning of the religious freedom provisions of the First Amendment, if, as we think, the decisions of the Supreme Court conclude the question to be decided. In *Everson v. Board of Education*, *supra*, 330 U.S. at 15-16, Mr. Justice Black, writing for the majority, said in part:

<sup>2</sup> No question is raised under the Constitution of this State. See Article 36 of the Maryland Declaration of Rights. Cf. Article 37 and *Torcaso v. Watkins*, 367 U.S. 488.



"The establishment of religion clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect a wall of separation between church and State."

The dissents in that case did not challenge this interpretation of the coverage of the First Amendment as being too broad, but thought it was applied too narrowly to the facts of that case.

In *McCullum v. Board of Education*, 333 U.S. 203, the Supreme Court adhered to *Everson* and held invalid under the First Amendment the Illinois "released time" program for religious education in the public schools of Champaign. Such instructions was given on school property and on school time by representatives of several different faiths. Students who did not wish to take such instructions were excused from attendance, but were required to pursue secular studies in some other part of the school building. Students released from secular studies were required to be present at the religious classes, and reports of their presence or absence were to be made to their secular teachers. There were present in *McCullum* both the use of tax-supported property for religious purposes and close cooperation between school authorities and the local religious



council in promoting religious education. The majority opinion, written by Mr. Justice Black, stated, in part (339 U.S. at 209-10):

"The operation of the State's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And, it falls squarely under the ban of the First Amendment \* \* \* as we interpreted it in *Everson v. Board of Education*, 330 U.S. 1."

Mr. Justice Frankfurter, who had dissented in *Everson*, filed an opinion in which Mr. Justice Jackson, Mr. Justice Rutledge, and Mr. Justice Burton, who had also dissented in *Everson*, joined, stating the view that the Illinois released time program there involved was invalid under the First Amendment. In it he said (333 U.S. at 213): "We are all agreed that the First and Fourteenth Amendments have secular reach far more penetrating in the conduct of Government than merely to forbid an 'established church.'" This view was recently reiterated by the Supreme Court in *Torcaso v. Watkins*, 367 U.S. 488, at 493-94, in reversing a judgment of this Court.<sup>3</sup> In *McCollum*, Mr. Justice Jackson filed a separate concurring opinion in which he expressed agreement with the opinion of Mr. Justice Frankfurter and also concurred in the result reached by the Court. He expressed some reservations. First, he questioned whether the facts of the case established jurisdiction in the Supreme Court; and second, he thought that the Supreme Court should place some bounds on the demands for interference with local schools which that Court is empowered or willing to entertain. Mr. Justice Reed alone dissented.

<sup>3</sup> The opinion was written by Mr. Justice Black and six of the other members of the Court joined in it. Mr. Justice Frankfurter and Mr. Justice Harlan concurred in the result.

In *Doremus v. Board of Education*, 5 N.J. 435, 75 A. 2d 880, appeal dismissed, 342 U.S. 429, the New Jersey Supreme Court upheld a statute of that State providing for the reading, without comment, of five verses of the Old Testament at the opening of each public-school day. The Supreme Court of the United States dismissed an appeal from that judgment because of the lack of standing of the appellants to maintain the suit. One appellant was a parent of a child who had graduated, and the case was held moot with respect to that child. The claims of the appellants as taxpayers were held insubstantial and insufficient. Mr. Justice Douglas, with whom Mr. Justice Reed and Mr. Justice Burton agreed, dissented as to the latter holding and thought that the case should have been decided on the merits. The majority opinion intimated doubt as to whether the allegations of the complaint showed injury to the child (who had by then graduated) while she was a student, pointing out that there was "no assertion that she was injured or even offended [by the Bible reading] or that she was compelled to accept, approve or confess any dogma or creed or even to listen when the Scriptures were read" and also that there was a stipulation that any child could be excused, at his or her parents' request, from the Bible reading and that no such request had been made. 342 U.S. at 432. The Supreme Court did not, however, rest its dismissal of the appeal of the parent of this child on any ground other than mootness.

In *Zorach v. Clauson*, *supra*, the New York "released time" program for religious education for public school students was upheld. Attendance was not compulsory and the religious instruction was not given in school buildings nor was any public expense involved. Students were released on written request of their parents to leave the school premises to receive religious instruction or join in devotional exercises at religious centers, and reports of their attendance were furnished to school authorities by the religious bodies. Students not released to attend religious instruction or observances were required to re-

main in their classrooms. In the opinion of the Court in *Zorach*, Mr. Justice Douglas made the often-repeated statement relied upon by the majority of this Court in this case and by this Court in *Torcaso v. Watkins*, 223 Md. 49, 162 A. 2d 438, *reversed*, 367 U.S. 488, that "We are a religious people whose institutions presuppose a Supreme Being." 343 U.S. at 313. The Court held, over vigorous dissents by Mr. Justice Black, Mr. Justice Frankfurter and Mr. Justice Jackson, that there was no violation of the principle of separation of church and state and that under the New York released time plan "the public schools do no more than accommodate their schedules to a program of outside religious instruction." The Court then added: "We follow the *McCullum* case." *Id.* at 315.

Because of the different result in *Zorach* from that in *McCullum*, there was some belief (shared by this Court in *Torcaso*) that *Zorach* marked a retraction from *McCullum*. Since the decision of *Torcaso* by the Supreme Court there can hardly be any basis for such a continued interpretation of *Zorach*. The "wall of separation" between church and state recognized by both the majority and the dissenters in *Everson*, and described as "high and impregnable" in *McCullum* (to which case the Court expressed its adherence in *Zorach*), remains as high and impregnable as ever under *Torcaso*. Cf. *McGowan v. Maryland*, 366 U.S. 420, and companion cases, *Gallagher v. Crown Kasher Super Market*, 366 U.S. 617; *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582; and *Braunfeld v. Brown*, 366 U.S. 599.

There seems to be no substantial room for dispute that the reading of passages from the Bible and the recital of the Lord's Prayer are Christian religious exercises.<sup>4</sup> This being so, the inclusion of such a reading or recital in the opening exercises of the public schools seems plainly to favor one religion and to do so against other religions and against non-believers in any religion. This, I think, is directly contra to the prohibition against any "law re-

<sup>4</sup> If the exercises were confined to reading from the Old Testament, they would be both Jewish and Christian, but still religious.

specting an establishment of religion," contained in the First Amendment, as that provision has been interpreted by the Supreme Court. See the *Everson*, *McCullum*, *Torcaso* and *McGowan* cases, all cited above. I find nothing inconsistent with the broad interpretation therein set forth in either *Doremus* or *Zorach*. I have already quoted from *Torcaso* as to the penetrating reach of the First Amendment. In *McGowan*, the Chief Justice said in the opinion of the Court (366 U.S. at 441-42): "But, the First Amendment, in its final form, did not simply bar a congressional enactment establishing a church; it forbade all laws respecting an establishment of religion. Thus, this Court has given the Amendment a broad interpretation \* \* \* in the light of its history and the evils it was designed forever to suppress." The Court then cited *Everson*, 330 U.S. at 14-15 and cited and briefly discussed *McCullum* as holding the religious instruction program there involved "to be contrary to the 'Establishment' Clause." The religious exercises here prescribed seem to me no less so. Here we are dealing not merely with released time, but with a prescribed religious exercise conducted by public school officials in public schools of the State, attendance at which schools (with exceptions not here important) is required (Code (1957), Art. 77, Sec. 231), during school time and in school buildings. Granting that the use of school buildings is not a determinative factor in distinguishing *McCullum* and *Zorach*, I think that, if present, it is a relevant factor in determining whether the State is lending its aid to promoting religion. There is, I think, a marked difference between an accommodation of the public school schedule to religious instruction and the inclusion of religious exercises in public school ceremonies. I think that here the State is lending its aid to religion and that *McCullum* is controlling.

The fact that individual students, or theoretically all students, may be excused from attendance at these exercises does not, in my estimation, save the rule from collision with the "establishment of religion" clause of the First Amendment, even if it could save it from collision with the "free exercise of religion" clause. The coercive or com-

pulsive power of the State is exercised at least to the extent of requiring pupils to attend school and it requires affirmative action to exempt them from participation in these religious exercises.

The conclusion is in accord with the result reached by a special three-judge District Court, in Pennsylvania in *Schempp v. School District of Abington Township*, F. Supp. , decided February 1, 1962. The opinion was written by Biggs, C. J., after remand of the case by the Supreme Court (364 U.S. 298) following the amendment of the Pennsylvania statute ~~pendente lite so as to provide~~ for pupils to be excused upon the written request of a parent or guardian from attending the reading, without comment, of ten verses from the Bible, such reading still being made compulsory in public schools of that Commonwealth.

I have carefully considered the case of *Engel v. Vitale*, supra, 10 N.Y. 2d 174, 218 N.Y.S. 2d 579, in which five of the Judges of the Court of Appeals of New York concurred in upholding the reading in a public school of that State of the so called "Regents' Prayer". There, as in the instant case and in *Schempp*, there were provisions for students to be excused from the exercises at which the prayer was required to be said. I find the dissenting opinion of Judge Dye, in which Judge Fuld concurred, more persuasive than the majority views. The majority seems to me to do as this Court did in *Torcaso* in placing too much reliance on the result of *Zorach* and the oft-quoted statement that "We are a religious people whose institutions presuppose a Supreme Being." The opinion of Justice Dye interprets the decisions of the Supreme Court substantially as I have endeavored to do in this dissent.

Despite the provisions for excuse from attending these religious exercises, two further questions relating to coercion (apart from what might be called the general coercion already considered in connection with the "establishment of religion" clause) still remain. One is whether or not there is coercion upon the individual student by rea-



son of his incurring suspicions and losing caste with his fellows, as alleged in the petition. The other is whether or not there is compulsion upon the student or his parent requesting that he be excused, or upon both, to profess disbelief in any religion.

As to the first of these questions it seems to me that under our ordinary rules of pleading, the allegations of the petition are not so insubstantial as to be brushed aside as mere conclusions of the pleader, and that they are sufficient on demurrer. The Supreme Court has recognized in *Brown v. Board of Education*, 347 U.S. 483, in applying the Fourteenth Amendment, that psychological effects upon children may be of vital importance. Such factors are alleged here, and as the case now stands they are admitted by the demurrer.

With regard to the second question stated — requiring a profession of disbelief — the situation here seems to be the converse of *Torcaso*. There the Supreme Court struck down the provision of the Constitution of this State requiring as a condition of holding an office of public trust that the person elected or appointed thereto declare his belief in the existence of God. Here, since attendance at these religious exercises is compulsory, unless a written parental excuse is filed, what amounts to a profession of disbelief in the religion to which they pertain is required of the parent and perhaps also of the child, at the peril of the child being subjected to the pressures alleged or of the parent and the child, too, if he is old enough to comprehend and share his parents' views respecting religion, subordinating or abandoning their convictions. Cf. *Talley v. California*, 362 U.S. 60, involving a freedom of speech question. Neither a profession of belief nor of disbelief may be required.

These considerations illustrate the intermeshing of the "establishment of religion" and of the "free exercise" clauses of the First Amendment. Hesitancy to expose a child to the suspicions of his fellows and to losing caste with them, will tend to cause the surrender of his and his parents' religious or nonreligious convictions and will



thus tend to put the hand of the State into the scales on the side of a particular religion which is supported by the prescribed exercises. *Torcaso* quoted from *Everson* with regard to the meaning of the establishment clause; it also explicitly held that the provision which was there condemned "invades the appellant's freedom of belief and religion and therefore cannot be enforced against him." Whether *Torcaso* proceeds on one or the other or both of the religious freedom provisions of the First Amendment, it seems clear under all of the cases, including *Zorach*, that coercion is barred.

*Engel v. Vitale*, *supra*, cert. granted 368 U.S. 924, was argued on April 3, 1962, and is now awaiting determination by the Supreme Court. I believe that its decision in that case will be determinative of this. Meanwhile, I can only state my understanding of the effect of prior decisions of the Supreme Court and express my own opinion that those decisions call for a decision of this case reaching a result opposite to that reached by a majority of this Court.

Judge Henderson and Judge Prescott have authorized me to say that they join in this dissent.

# JUDGMENT APPEALED FROM

Court of Appeals of Maryland

No. 90: September Term, 1961

William J. Murray, III, infant, etc., et al.

v.

John N. Curlett, et al and Board of School  
Commissioners of Baltimore City.

April 6, 1962—Judgment affirmed; appellants to pay the costs. Op. Horney, J. Brune, C. J. dissents and files dissenting opinion, in which Henderson and Prescott, J.J. concur.

## STATE OF MARYLAND, Set:

I, J. LLOYD YOUNG, Clerk of the Court of Appeals of Maryland, the highest Court of said State with final jurisdiction on appeals from the trial courts therein, do hereby certify that the foregoing are full and true copies of the documents, originals of which are on file in the office of said Clerk, in the appeal of *William J. Murray, III, Infant, etc., et al v. John N. Carlett et al and Board of School Commissioners of Baltimore City*, No. 90 -- September Term, 1961:

1. Appellants' Appendix, filed in this office on August 5, 1961.
2. Appellees' Appendix, filed in this office on September 25, 1961.
3. Majority Opinion of the Court of Appeals, filed on April 6, 1962.
4. Dissenting Opinion filed on April 6, 1962.
5. Docket Entries therein of the Court of Appeals.

IN TESTIMONY WHEREOF, I have hereunto set my hand as Clerk and affixed the seal of the Court of Appeals of Maryland this twenty-sixth day of April, 1962.

(Seal)

J. LLOYD YOUNG,

Clerk, Court of Appeals of Maryland

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1961

No. **119**

**WILLIAM J. MURRAY III, INFANT, BY MADALYN E.  
MURRAY, HIS MOTHER AND NEXT FRIEND, AND  
MADALYN E. MURRAY, INDIVIDUALLY,**  
*Petitioners,*

vs.

**JOHN N. CURLETT, PRESIDENT, SAMUEL EPSTEIN, MRS.  
M. RICHMOND FARRING, ELI FRANK, JR., DR.  
ROGER HOWELL, HENRY P. IRR, DR. WILLIAM  
D. McELROY, MRS. ELIZABETH MURPHY PHIL-  
LIPS, JOHN R. SHERWOOD, INDIVIDUALLY, AND CON-  
STITUTING THE BOARD OF SCHOOL COMMIS-  
SIONERS OF BALTIMORE CITY,**

*Respondents.*

**BRIEF IN OPPOSITION TO PETITION FOR  
WRIT OF CERTIORARI**

**FRANCIS B. BURCH,**  
City Solicitor,  
**PHILIP Z. ALTFELD,**  
Assistant City Solicitor,  
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Baltimore 2, Md.  
**For Respondents.**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1961

No. 970

WILLIAM J. MURRAY III, INFANT, BY MADALYN E.  
MURRAY, HIS MOTHER AND NEXT FRIEND, AND  
MADALYN E. MURRAY, INDIVIDUALLY,

*Petitioners,*

vs.

JOHN N. CURLETT, PRESIDENT, SAMUEL EPSTEIN, MRS.  
M. RICHMOND FARRING, ELI FRANK, JR., DR.  
ROGER HOWELL, HENRY P. IRR, DR. WILLIAM  
D. McELROY, MRS. ELIZABETH MURPHY PHIL-  
LIPS, JOHN R. SHERWOOD, INDIVIDUALLY, AND CON-  
STITUTING THE BOARD OF SCHOOL COMMIS-  
SIONERS OF BALTIMORE CITY,

*Respondents.*

**BRIEF IN OPPOSITION TO PETITION FOR  
WRIT OF CERTIORARI**

**PRELIMINARY STATEMENT**

This brief is submitted on behalf of the Board of School Commissioners of Baltimore City, Respondents, in opposition to the granting of the writ of certiorari sought herein. The basis for this opposition is set out as follows:

(1) The judgment handed down by the Court of Appeals of Maryland is not in conflict with the First and Fourteenth



Amendments of the Federal Constitution, as so analyzed and interpreted by this Court in *Engel v. Vitale*, U.S. (1961), 18 Misc. 2d 659, 191 N.Y.S. 2d 453; *Zorach v. Clauson*, 343 U.S. 306, 72 S. Ct. 679, 96 L. Ed. 954 (1952); *Church of the Holy Trinity v. United States*, 143 U.S. 457, 12 S. Ct. 511, 36 L. Ed. 226 (1892); *West Virginia State Board of Education v. Barnett*, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628, 147 A.L.R. 674 (1943); and *Torcaso v. Watkins*, 367 U.S. 488, 81 S. Ct. 1680, 6 L. Ed. 2d 982, (1961). Furthermore, under the criteria expressed by this Court for the granting of certiorari, there is presented no Federal question of any substance worthy of review by this Court.

(2) The allegation of the Petitioners as to the injury they sustained and their further allegation as citizens and taxpayers does not give them sufficient standing to raise the question herein. *Doremus v. Board of Education*, 5 N.J. 453, 75 A. 2d 880 (1950), Appeal dismissed 342 U.S. 429, 72 S. Ct. 394, 96 L. Ed. 475 (1951).

### **JURISDICTION**

The Petitioners herein invoked the jurisdiction of the Court under 28 U.S.C. Sec. 1257(3).

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

This case involves:

1. Section 1 of the Fourteenth Amendment to the Constitution of the United States.
2. First Amendment to the Constitution of the United States.
3. Article 77, Sections 202 and 203 of the Annotated Code of Maryland (Michie 1957) Section 91 of Charter

and Public Local Laws of Baltimore City (Flack 1949).

4. Article VI, Section 6 of Rules of Board of School Commissioners of Baltimore City. Amendment to Rule adopted November 17, 1960.

5. Article 77, Section 231 of Annotated Code of Maryland (Michie 1957).

All of these are set forth verbatim on pages 3, 4 and 5 of the petitioner's certiorari brief.

### STATEMENT OF THE CASE

#### A. *Background of the morning opening exercises.*

In 1905 the Board of School Commissioners adopted as one of its rules Article VI, Section 6. This was done pursuant to its rule-making powers as vested in the Board by Article 77, Section 202 of the Annotated Code of Maryland (Michie 1957). This rule provides in effect that portions of the Bible and or the Lord's Prayer are to be recited during morning opening exercises without comment. Thereafter, on November 17, 1960, the School Board, upon the advice of the Attorney General of Maryland, amended the rule to excuse any child from participating in, or attending, the exercise upon the written request of a parent or guardian. His mother having made such request, the infant petitioner was thereafter excused from the morning exercises.

#### B. *The nature and background of this litigation*

Prior to the adoption of the amendment by the School Board, the Petitioners requested a hearing before the Board to voice their objection to the continued compliance with Article VI, Section 6, of the School Board rules. Confronted

with this demand, the Board requested an opinion from the Attorney General of Maryland relating to the validity of the rule which this Court is now being asked to declare unconstitutional. More specifically, the Attorney General was asked whether Bible reading in the public schools is Constitutional per se, and if so, must the rule further provide that those who object be excused. Both questions were answered affirmatively.

As to the first question, the opinion stated:

"It would seem reasonable to conclude that the 'establishment' clause dictates that there be a separation between Church and State, but not that the State need be stripped of all religious sentiment. It would be tragic if the State of Maryland, whose history, traditions, founding, and its early law are steeped in religious connotations, would be compelled to forbid to its children as a part of their education, the right and duty to bow their heads in humility before the Supreme Being."

In concluding on this point, the Attorney General stated:

"As applied to this case, we believe that while every individual has a Constitutional right to be a non-believer, that right is a shield, not a sword, and may not be used to compel others to adopt the same attitude."

On the question of compulsion, an analysis of cases in this area led the Attorney General to find that, "... despite the basic principle, a school devotional exercise would none the less be objectionable if there were any direct compulsion. Any coercion would be an abridgment of one's individual right to the 'free exercise' of religion." Accordingly, it was suggested to the School Board that provision be included within the appropriate rule to allow objectors to be excused from attending the recital.

Dissatisfied with this opinion and the resulting adoption of the amendment, the Petitioners, on December 7, 1960, filed a Petition for a writ of mandamus in the Superior Court of Baltimore City against the Respondents, praying that the Board be commanded to "rescind and cancel" the aforesaid rule, as amended, and to cause the teachers of Baltimore City to discontinue the practice of reading portions of the Bible and or reciting the Lord's Prayer during the morning exercise.

On January 16, 1961, the Respondents demurred to the Mandamus Petition on the ground that it did not state a cause of action for which relief may be granted by way of mandamus.

On March 2, 1961, a hearing without benefit of record was held on the demurrer, and on April 27, 1961, the trial court filed a memorandum opinion in which the demurrer was sustained without leave to amend. The lower court (Prendergast, J.) in its opinion, stated very aptly that:

"If religion, pure and undefiled and in every form, were removed from the classrooms, there would remain only atheism. While the present Petitioners clamor for religious freedom, their ultimate objective is religious suppression. The two concepts are mutually repugnant. One cannot practice religion if he has no religion to practice. If Petitioners were granted the relief sought, then they, as non-believers, would acquire a preference over the vast majority of believers. Our Government is founded on the proposition that people should respect the religious view of others, not destroy them." (Emphasis supplied.)

The Petitioners appealed to the Court of Appeals of Maryland, raising the following questions:

1. Do the First and Fourteenth Amendments compel the total abolition of the reading, without comment, of a por-

tion of any version of the Bible and or the use of the Lord's Prayer where no evidence of any compulsion exists upon any pupil to participate and where any pupil, upon parental objection, may be excused from participation?

2. Does the fact that a pupil can be excused from participation in the opening exercises violate the "equal protection" clause of the Fourteenth Amendment?

After argument in November, 1961, the Court of Appeals ordered re-argument in February, 1962, regarding the Constitutional questions only. By a divided Court (4-3) the reading of a portion of the Bible and or the Lord's Prayer in the public schools was upheld. The majority reviewed and analyzed the leading cases involving the question of Separation of Church and State, as well as lower Court decisions relating precisely to the question at bar. After discussing the facts, the Court said:

But here, where the use of school time and the expenditure of public funds is negligible, we think the daily opening exercises of the schools in Baltimore City are in the same category as the opening prayer ceremonies in the Legislature of this State and in the Congress of the United States, in the public meetings and conventions which are opened with prayers or supplications to God, and in the formal call of Court sessions by the Crier in State and Federal Courts. For these reasons, and particularly because the Appellant-Student in this case was not compelled to participate in or attend the program he claims is offensive to him, we hold that the opening exercises do not violate the religious clauses of the First Amendment."

Final judgment was entered in the office of the Clerk of the Court of Appeals of Maryland on April 6, 1962 Appendix to Petitioners' brief, pages 22 (a) and 23 (a).

## REASONS FOR DENYING THE WRIT

### POINT I.

The judgment handed down by the Court of Appeals of Maryland upholding the constitutionality of the morning opening exercises in the public schools as so prescribed by the School Commissioners of Baltimore City is not in conflict with the First and Fourteenth Amendments of the Federal Constitution, as so analyzed and interpreted by this Court in *Engel v. Vitale*, 370 U.S. 421, 18 Misc.2d 659, 191 N.Y.S. 2d 453. Furthermore, the judgment is in accord with the holdings in *Zorach v. Clauson*, 343 U.S. 306, 72 S. Ct. 679, 96 L. Ed. 954 (1952); *Church of the Holy Trinity v. United States*, 143 U.S. 457, 12 S. Ct. 511, 36 L. Ed. 226 (1892); *West Virginia State Board of Education v. Barnett*, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628, 147 A.L.R. 674 (1943); and *Torcaso v. Watkins*, 367 U.S. 488, 81 S. Ct. 1680, 6 L. Ed. 2d. 2d 982 (1961). The writ of certiorari should therefore be denied.

As stated in part by Rule 19 of this Court, the granting of the writ of certiorari is not a matter of right but of sound judicial discretion and will be granted only where there are special and important reasons presented. Paragraph (a) of that Rule, in elaboration, expresses two examples generally deserving of review. First, where a State Court has decided a Federal question of substance not previously passed upon by this Court. Second, where the State Court has rendered a decision not in accord with applicable decisions of this Court. Neither ground is applicable in the present case. Cf. *Zorach v. Clauson*, *supra*, and related cases.

The opening exercise notwithstanding Petitioners' claim that it "pronounces belief in God as the source of all moral and spiritual values, equating these values with religious



values, and thereby renders sinister, alien and suspect the beliefs and ideals of your Petitioners, promoting doubt and question of their morality, good citizenship and good faith — Appellants' original Petition, Court of Appeals of Md., E. 4) simply constitutes a public recital of an ancient and historical document in recognition of the existence of a Supreme Being in a predominantly religious society. It is an exercise at the start of the school day which by its very nature is intended to cause the student to soberly approach his work of that day.

It is submitted that the decision of this Court in *Engel v. Vitale, supra*, was not intended to prohibit Bible reading in the public schools. Respondent does not quarrel with what it understands that holding to mean, namely, that a governmental agency is prohibited by the Constitution from composing prayers for recitation in the public schools. For it is recognized that, had this Court concluded otherwise each State would then possess the clear authority to compose a prayer to its personal liking. It is not inconceivable that due to the ever present existence of personal prejudices for or against certain races and religions in various parts of our country, prayers could be composed favoring one race or religion over another. In addition, it seems not unlikely that an area in which a particular denomination predominates could designedly, by the composition of a prayer, either extend preference to that denomination or suppress another. This same danger does not exist when provision is made simply for the ancient, traditional and historical reading of the Bible and or the Lord's Prayer with adequate provision for excuse.

Mr. Justice Black, speaking for the majority in *Engel, supra*, said (at pp. 3 and 4 of the Opinion of the Court):

There can, of course, be no doubt that New York's program of daily classroom invocation of God's

blessings as prescribed in the Regents' prayer is a religious activity. It is a solemn avowal of divine faith and supplication for the blessings of the Almighty. The nature of such a prayer has always been religious, none of the respondents has denied this and the trial court expressly so found:

The religious nature of prayer was recognized by Jefferson and has been concurred in by theological writers, the United States Supreme Court and State courts and administrative officials, including New York's Commissioner of Education. A committee of the New York Legislature has agreed.

The Board of Regents as *amicus curiae*, the respondents and intervenors all concede the religious nature of prayer, but seek to distinguish this prayer because it is based on our spiritual heritage.

*"The petitioners contend among other things that the state laws requiring or permitting use of the Regents' prayer must be struck down as a violation of the Establishment Clause because that prayer was composed by governmental officials as a part of a governmental program to further religious beliefs. For this reason, petitioners argue, the State's use of the Regents' prayer in its public school system breaches the constitutional wall of separation between Church and State. We agree with that contention since we think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government." (Emphasis supplied.)*

Clearly, this Court did not proscribe every form of religious activity in the public schools. If such had been the holding, then the Regents' prayer would have been struck

down merely because it is a "religious activity". However, the Court was careful not to rest its decision on that basis. It struck down the prayer because it was "composed" by governmental officials. The narrow holding of *Engel v. Vitale, supra*, is that "... it is no part of the business of government to *compose* official prayers for any group of the American people to recite as a part of a religious program carried on by government." (Emphasis supplied.)

This, we submit, was the essence of this Court's objection to the New York exercise. *No such fatal defect is present in the instant case.* Nowhere in the case at bar do we find the government's hand in the composition of a prayer. The Respondent School Board, in its rule, relies solely on Biblical text without intervention of any municipal agency as to additional remarks or comments.

Furthermore, Mr. Justice Douglas, in his concurring opinion, said: "It is customary in deciding a constitutional question to treat it in its narrowest form." His recognition of this point further emphasizes that this Court intended to limit *Engel, supra* strictly to its own facts and that it did not intend it to include, in supposition form, the many ramifications which may be thought by some to evolve from this decision.

If the Baltimore School Board rule were to state that selected passages from the Declaration of Independence and the Star Spangled Banner (our most sacred national heritages containing the full embodiment of Americanism) should be read before the beginning of each school day, one could hardly commend to this Court that such would be in violation of the First and Fourteenth Amendments. To do so would be to say that the Declaration of Independence and our National Anthem are themselves unconstitutional. And yet in furtherance of such a rule, the following reading or recitation could be prescribed:

"We hold these truths to be self evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and the Pursuit of Happiness \* \* \* appealing to the Supreme Judge of the World for the rectitude of our intentions \* \* \* with a firm reliance on the protection of Divine Providence \* \* \*" (Declaration of Independence). "We praise the power that hath preserved us a nation. In God is our trust" (Star Spangled Banner).

These are "self-evident" truths which proclaim in the words of our forefathers the golden rule.

And it is equally self evident that these passages had their origins in the traditions of our ancient religious heritages, primarily the Bible.

Certainly, if it should seriously be contended that an opening exercise of the sort suggested is violative of the Constitution, then it could equally well be argued, in fact even more forcefully so, that the National Anthem and the Salute to the Flag ("one nation indivisible under God") are *per se* in violation of the First Amendment since they have been adopted in their specific forms by Acts of the Congress. Indeed the antagonists to religionists could be expected to argue that the Declaration of Independence which preceded the Constitution likewise violates that latter document.

If, therefore, the recitation or reading in the schools of portions of these national writings is a violation of the Fourteenth Amendment (which includes by implication the prohibitions of the First Amendment) because they run counter to the establishment of religion clause, then the Acts of Congress which provided for the National Anthem and the Salute to the Flag are equally objectionable because they represent the direct act of the Federal Government in a prohibited field. This is the *reductio ad absurdum* of

the Petitioner's argument and of those who would have this Court strike down all exercises in the schools and elsewhere which have any religious connotations or which refer to a Supreme Being. They would make a mockery of the Declaration of Independence, which presaged, indeed gave birth to, the Constitution. They would declare to those who gave their lives at Yorktown, Gettysburg, the Marne, Iwo Jima, Chosin Reservoir and all other battles fought to preserve our national heritages, that they had been duped by the declarations and purposes on which this Country had been founded. They would declare to those of this generation and of the generations to come that these hallowed writings were conceived in error and are simply sops for the misguided and uninformed. In short, they would ask this Court to repudiate its many declarations such as that of Mr. Justice Douglas that "We are a religious people whose institutions presuppose a Supreme Being." (*Zorach v. Clauson*, p. 313 of 343 U.S.)

And if the reading of the selected passages from our National documents is proper, which indeed this Court would surely approve, then the reading of passages, without comment, from the writings which formed the foundation of these National declarations is equally proper.

It is, therefore, submitted that total reliance on the *Engel* decision, *supra*, as being determinative of the instant case, is to wrongly interpret the Court's holding. No inconsistency exists in disallowing governmental authorship, on the one hand, and allowing the time honored reading of the ancient Bible and an ancient prayer, on the other. In addition, there have been other cases decided by this Court which resolve the question here presented, thereby warranting the denial of the writ here sought.



Initially, the significance of opening exercises was eloquently and succinctly expressed by Mr. Justice Douglas in *Zorach v. Clauson*, 343 U.S. 306, 313, 72 S. Ct. 679, 684, 96 L. Ed. 954 (1952), when he said, "We are a religious people, whose institutions presuppose a Supreme Being." These words echo the written and spoken thoughts of the Continental Congress in 1775, the Declaration of Independence in 1776, the acts of our Congress throughout its life, the swearing in of the President, the members of Congress and indeed the members of this very Court, and the pronouncements of the President of the United States in his Inaugural Address on January 20, 1961.

Are these gestures merely token recognition of the existence of God? Obviously not. They are the embodiment of our spiritual heritage, the impetus which caused our Founding Fathers to flee to our shores from the wrath of religious tyranny for the freedom they had so longingly sought.

In *Church of the Holy Trinity v. U.S.*, 143 U.S. 457, 470, 12 S. Ct. 511, 516, 36 L. Ed. 226, 231 (1891), this Court thoroughly analyzed various State Constitutional provisions relating to the recognition of a Supreme Being and concluded, through Mr. Justice Brewer:

"There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning; they affirm and re-affirm that this is a religious nation. These are not individual sayings, declarations of private persons; they are organic utterances; they speak the voice of the entire people. . ."

And continuing with Mr. Justice Douglas' observations in *Zorach v. Clauson*, 343 U.S. 306, 72 S. Ct. 679, 96 L. Ed. 954 (1952), at p. 313:

"We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom



to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of Government that shows no partiality to any one group and that lets each flourish according to the will of its adherents and the appeal of its dogma. When the State encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our tradition. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not, would be to find in the Constitution a requirement that the Government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe." (Emphasis supplied.)

The recital of a few verses of the Bible and/or the reading of the Lord's Prayer, without comment, is thus in keeping with the views of this Court expressed both in *Church of the Holy Trinity*, and *Zorach, supra*. Here the School Board, in providing for morning exercises, is demonstrating the very respect and encouragement which this Court has approved. Indeed the reading itself is demonstrative of the State's cooperation with the spiritual needs of its people.

Petitioners relied, and now continue to rely, on *McColum v. Board of Education*, 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 646 (1948), which struck down the Illinois released time program. They claim that a parallel situation exists because here, as there, the exercise is conducted on school premises. A closer examination of the facts in *McColum, supra*, however, shows a program of formal sectarian religious education carried on during regular school hours wherein pupils were segregated in accordance with their particular faiths. The difference between the two situations is indeed obvious. One cannot seriously compare a

brief recital of the Scriptures made without comment to actual sectarian religious instruction during classroom time.

The decision of *West Virginia State Board of Education v. Barnett*, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628, 147 A.L.R. 674 (1943), goes to another of the important issues raised by the Petitioners, namely, compulsion. An examination of this opinion supports the Respondent's argument that this Court has already dealt with and disposed of the problem of compulsion. There, the students and teachers were required by the State Board of Education to pledge allegiance to the flag as part of the morning opening exercises. The objectors to this act were Jehovah's Witnesses, who considered participation in the salute as an act of idolatry and, therefore, contrary to their religious convictions. Failure to engage in the flag exercise resulted in expulsion and possible criminal prosecution. The Supreme Court struck down as unconstitutional the compulsive factor involved "insofar as it applies to children having conscientious scruples against giving such salute." However, the mandate applied only to those students and not to the exercise itself.

Obviously this Court's edict did not apply to all the pupils, even though the exercise was offensive to a minority group. In the case at Bar, the Petitioners, though objecting to the exercise and claiming they have been "wronged", would ask this Court to strike the entire exercise as to all children now attending the public schools. Such a request is clearly inconsistent with the decision in the *Barnett* case, *supra*.

\*Petitioners, before the Maryland Court of Appeals, and now here, rely on *Torcaso v. Watkins*, 367 U.S. 488, 81 S. Ct. 1680, 6 L. Ed. 2d 982 (1961), in support of their position that a "State Government [is] forcing or influencing a

person . . . to profess a belief or disbelief in any religion as prohibited in *Everson v. Board of Education* (330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711)" (1947).

It should first be noted that in *Torcaso*, *supra*, this Court did not strike down the taking of an oath *per se*, it merely held that one could not be compelled by the State to take an oath in order to hold public office, since that would constitute religious compulsion. Here the School Board is not compelling anyone to believe in religion. The students are not compelled to do anything in relation to the opening exercises. They are not asked to speak. They are not requested to perform any act. They are not required to remain in the classroom. As stated in the majority opinion by the Maryland Court of Appeals in the instant case. "The present case, however, as has been pointed out, is completely devoid of any compulsion or coercion to attend school opening exercises."

Yet Petitioners are asking that a traditional exercise of this type be forever barred to all students. They are asking that the overwhelming majority of our young people be denied the right to even contemplate or meditate on the existence of God in the classroom through the medium of long accepted writings. They ask for a complete and unequivocal compliance with their personal view, i.e., atheism. In the words of the *nisi prius* Judge in this case, while they "clamor for religious freedom, their ultimate objective is religious suppression." What they seek is not the protection of their constitutional rights but the denial to all others of the rights guaranteed to them under the First Amendment that they shall not be prohibited the free exercise of religion.

On the basis of *Zorach v. Clauson*, *supra*, *Church of the Holy Trinity v. U.S.*, *supra*, *West Virginia State Board of Education v. Barnett*, *supra*, and *Torcaso v. Watkins*, *supra*, it is submitted that the issue of constitutionality has been properly determined and no substantial Federal question is presented here necessitating review by this Court.

#### POINT II.

The allegation of the Petitioners as to the injury they sustained and their further allegation as citizens and taxpayers does not give them sufficient standing to raise the question herein under *Doremus v. Board of Education*, 5 N.J. 453, 75 A. 2d 880, Appeal dismissed (1950) 342 U.S. 429, 72 S. Ct. 394, 96 L. Ed. 475 (1951). The fact that the Petitioners claim in characteristically nebulous terms that they were injured or offended by the morning opening exercises, and then fail to affirmatively show that they suffered and sustained "good-faith pocketbook" loss and financial injury, can only lead to the conclusion that they had no standing from the start to maintain the present action.

In *Doremus v. Board of Education*, *supra*, this Court denied the Appellant's request for certiorari on the grounds that the question before it was rendered moot due to the ensuing graduation of the Appellant from the public school system prior to a hearing on its merits. However, other considerations were discussed by the Court which directly relate to the position of the present Petitioners.

Initially, Petitioners allege that the enforcement of the rule "threatens their religious liberty" and that by voluntarily excluding himself from the exercise causes the Petitioner "to lose caste with his fellow, to be regarded with aversion, and to be subjected to reproach and insult". It

is submitted that these assertions are imaginary in nature and exist only in the minds of the Appellants. No facts have been exhibited by the Petitioners in their Complaint to substantiate these allegations. Furthermore, there is no allegation that he was "compelled to accept, approve or confess agreement with any dogma or creed or even to listen when the Scriptures are read." (*Doremus v. Board of Education, supra.*) The only allegation is that, in essence, he objects to the exercise.

The question of standing was recognized and discussed by the Supreme Court of New Jersey in *Doremus, supra*, at pp. 881 and 882 as follows:

"No one is before us asserting that his religious practices have been interfered with, [What religious practices can an atheist have?] or that his right to worship in accordance with the dictates of his conscience has been suppressed. No religious sect is a party to the cause. No representative of, or spokesman for, a religious body has attacked the statute here or below. One of the Plaintiffs is 'citizen and taxpayer', and the only interest he asserts is just that, and in those words set forth in the Complaint and not followed by specifications or proof. It is conceded that he is a citizen and a taxpayer, but it is not charged and it is neither conceded nor proved that the brief interruption in the day's schooling caused by compliance with the statute adds cost to the school expenses or varies by more than an incomputable scintilla the economy of the day's work." (Bracketed words ours.)

The facts in the instant case fit well within this analysis by the New Jersey Court. In many respects, the issues are identical. By applying *Doremus, supra*, to the case at bar, denial of certiorari therefore follows. Even though this Petitioner is still a student in a public high school, he has not shown how he possibly sustained pecuniary loss. The



original Petition filed in these proceedings alleges that the adult Petitioner is a "citizen resident and taxpayer of Baltimore City, State of Maryland." In *Doremus, supra*, this Court said, through Mr. Justice Jackson, "There is no allegation that this activity is supported by any separate tax or paid for from any particular appropriation or that it adds any sum whatever to the cost of conducting the school. No information is given as to what kind of taxes are paid by the Appellants and there is no averment that the Bible reading increases any tax they do pay or that as taxpayers they are, will or possibly can be out of pocket because of it."

It is submitted that this same language is applicable to the case at bar. Appellants cannot show the direct pecuniary interest that the law requires them to demonstrate. Merely relying on vague, indefinite allegations is not enough. They do not fit into *Everson v. Board of Education*, 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947), namely, an averment of actual School District funds disbursed to parents. The issue here is solely one of religious objection. Without showing the required injury needed to maintain a taxpayer's suit, this Petition must fail.

### CONCLUSION

For the reasons stated above it is respectfully submitted that the appeal herein presents no federal question worthy of consideration by this Court. The decision of *Engel v. Vitale, supra*, does not prohibit Bible reading or the recitation of the Lord's Prayer in the public schools. Previously decided cases by this Court on the question of Separation of Church and State approve of the type of opening exercises provided by the Respondent.



If, however, this Court finds that certiorari is warranted, Respondent requests that it be permitted to argue this case on the merits.

Respectfully submitted.

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City Solicitor.

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For Respondents.

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1961

No. [REDACTED] 119

**WILLIAM J. MURRAY, III, INFANT, BY MADALYN  
E. MURRAY, HIS MOTHER AND NEXT FRIEND, AND  
MADALYN E. MURRAY, INDIVIDUALLY,**

*Petitioners,*

*v.*

**JOHN N. CURLETT, PRESIDENT, SAMUEL EPSTEIN, MRS.  
M. RICHMOND FARRING, ELI FRANK, JR., DR.  
ROGER HOWELL, HENRY P. IRR, DR. WILLIAM  
D. McELROY, MRS. ELIZABETH MURPHY PHIL-  
LIPS, JOHN R. SHERWOOD, INDIVIDUALLY, AND CON-  
STITUTING THE BOARD OF SCHOOL COMMIS-  
SIONERS OF BALTIMORE CITY,**

*Respondents.*

**BRIEF OF ATTORNEY GENERAL OF MARYLAND,  
AMICUS CURIAE**

**THOMAS B. FINAN,**  
**Attorney General,**

**JAMES P. GARLAND,**  
**Assistant Attorney General.**

**ROBERT F. SWEENEY,**  
**Assistant Attorney General.**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1961

No. 970

WILLIAM J. MURRAY, III, INFANT, BY MADALYN  
E. MURRAY, HIS MOTHER AND NEXT FRIEND, AND  
MADALYN E. MURRAY, INDIVIDUALLY,  
*Petitioners,*

v.

JOHN N. CURLETT, PRESIDENT, SAMUEL EPSTEIN, MRS.  
M. RICHMOND FARRING, ELI FRANK, JR., DR.  
ROGER HOWELL, HENRY P. IRR, DR. WILLIAM  
D. McELROY, MRS. ELIZABETH MURPHY, PHIL-  
LIPS, JOHN R. SHERWOOD, INDIVIDUALLY, AND CON-  
STITUTING THE BOARD OF SCHOOL COMMIS-  
SIONERS OF BALTIMORE CITY,

*Respondents:*

BRIEF OF ATTORNEY GENERAL OF MARYLAND,  
AMICUS CURIAE

**PRELIMINARY STATEMENT**

This brief is submitted on behalf of the State of Mary-  
land in opposition to the granting of the Writ of Certiorari  
sought herein.

In addition to the separate political subdivision known  
as Baltimore City, there are 23 counties in the State of  
Maryland. Like Baltimore City each of those 23 counties

has a Board of School Commissioners whose duty it is to supervise the instruction and education of the children of this State residing in the particular county.

Article 6, Section 6, of the Rules of the Board of School Commissioners of Baltimore City, which is in question here, is applicable only within the geographic limits of that city. Subsequent to the decision of this Honorable Court in *Engel v. Vitale*, No. 468, October Term, 1961, decided June 25, 1962, the Office of the Attorney General of Maryland requested each of the various Boards of Education in this State to advise him whether or not opening exercises of a religious nature are held in the classrooms in those counties. From the responses to that inquiry it appears that no county in this State has a rule comparable to Article 6, Section 6, of the Rules of the Board of School Commissioners of Baltimore City, but that the practice of reciting either the Lord's Prayer or selected verses of the Scriptures is in use in every county of this State. Without exception, the practice is followed on a voluntary basis and those children who do not desire to participate are excused from so doing. This office is further advised that although in some instances pupils have requested to be excused, there have been no instances of objections being made to the practice of holding these religious exercises.

It is because of the statewide implication of the question presented in this case that this brief is presented on behalf of the State of Maryland in opposition to the petition for Writ of Certiorari.

### JURISDICTION

The petitioners herein invoked the jurisdiction of the court under 28 U.S.C.A. 1257 (3).

This brief of the State of Maryland as Amicus Curiae is filed under authority of Supreme Court Rules, Title 28 U.S.C.A., Rule 27, 1, (d).

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

This case involves (1) Section 1 of the Fourteenth Amendment to the Constitution of the United States, (2) First Amendment to the Constitution of the United States, (3) Article 77, Sections 202 and 203 of the Annotated Code of Maryland (1957 Edition), Section 91 of Charter and Public Local Laws of Baltimore City (Flack 1949); (4) Article 6, Section 6 of Rules of Board of School Commissioners of Baltimore City, Amendment to Rule adopted November 17, 1960, (5) Article 77, Section 231, of Annotated Code of Maryland (1957 Edition).

All of these are set forth verbatim on pages 3, 4, and 5 of the petitioner's Certiorari Brief.

### **STATEMENT OF THE CASE**

The Attorney General of Maryland adopts as the Statement of the Case herein the Statement of the Case as presented on pages 3, 4, 5, and 6 of the brief of the Respondents, James N. Curlett, et al.

### **REASONS FOR DENYING THE WRIT**

The objections to the use of prayer or Bible readings or any devotional exercises in the public schools in Maryland have been based upon the initial prohibition of the First Amendment to the United States Constitution as made applicable to the States through the Fourteenth Amendment. The First Amendment, of course, prohibits the State from establishing any religion. In the landmark case of *Zorach v. Clauson*, 343 U.S. 306, 96 L. Ed. 954 (1952),



however, holding that the New York "released time" program was not a violation of the Constitutional establishment clause, Justice Douglas in viewing our fundamental policy toward religion said at page 313:

"We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary . . . . When the State encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe . . . ."

The decision of this court in *Engel v. Vitale*, supra, clearly prohibits the use in the public schools in this country of any prayer composed by a governmental agency. The Attorney General of Maryland joined in the brief of the Attorney General of Nevada as an amicus curiae in *Engel* and we accept the decision of this court in that case. We believe, however, that the principle, that this court in considering a constitutional question treats that question in its narrowest form, must apply to the decision in *Engel*. We see nothing in *Engel* which would reverse the broad principle of *Zorach*, quoted above. We see nothing in *Engel* which would deny to the citizens of this State, whose history, traditions, and founding are steeped in religious connotations, the right to have their children bow their heads in humility before the Supreme Being. We hope and believe that the decision in *Engel* is restricted, as indicated by Mr. Justice Black, to the point that:

"... the constitutional prohibition against laws respecting the establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by Government."

Our thinking in this regard is bolstered by the language of Footnote No. 21 to the majority opinion, which recognizes that it would be proper to recite in school portions of historical documents such as the Declaration of Independence or verses of the Star Spangled Banner, our National Anthem, both of which include professions of faith in a Supreme Being. If it be proper to recite portions of the Declaration of Independence and of the Star Spangled Banner, acknowledging the existence of God, can it be improper to read passages from Scriptures — themselves historical documents and in fact the documents which were the cornerstone of the faith of the composers of the Declaration of Independence and the composer of our National Anthem?

It would be belaboring the obvious to point out that the decision of this court in *Engel*, supra, has caused widespread concern among many of the citizens of this country. That concern, we believe, stems from the apprehension that the decision in *Engel* is but the first in a series which would ultimately lead to the complete elimination of God from all of our institutions. We most certainly do not agree with those who would hold that the framers of the Constitution ever intended the First Amendment to be so construed nor do we believe that is or will be the opinion of this Honorable Court. We reiterate our belief that the holding of *Engel* is only that no governmental agency shall compose official prayers for any group of the American people to recite as a part of a religious program carried on

by Government. We believe the Maryland practice of reading from Scriptures, or of reciting a prayer so ancient that its origins are obscured in the mists of time, cannot be in contradiction of this rule.

Petitioners herein do more than ask for religious freedom. They ask that this court hold that the "religion" of secularism be adopted by this nation and the states comprising it. In the words of the nisi prius judge in this case, as quoted by the Respondents they "clamor for religious freedom, (but) their ultimate objective is religious suppression." His refusal to grant petitioners their objective was well founded, as was the decision of the Court of Appeals of Maryland in affirming that action.

### CONCLUSION

For the reasons stated herein and for the reasons so well set out in the Respondents' brief, the Attorney General, on behalf of the State of Maryland, requests that the court not grant Certiorari in the instant case. We believe that the petitioners present no Federal question worthy of consideration by this court. We particularly request, however, in the event this court should find Certiorari should be granted, that we then be permitted to argue this case on the merits.

Respectfully submitted,

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MOTION FILED

OCT 17 1962

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**Supreme Court of the United States**

**October Term, 1962**

---

**No. 119**

**WILLIAM J. MURRAY, III, Infant, etc., et al.,**  
*Petitioners,*  
*against*

**JOHN N. CURLETT, et al. and BOARD OF SCHOOL**  
**COMMISSIONERS OF BALTIMORE CITY,**  
*Respondents.*

---

**No. 142**

**SCHOOL DISTRICT OF ABLINGTON TOWNSHIP, et al.,**  
*Appellants,*  
*against*

**EDWARD LEWIS SCHEMPP, et al.,**  
*Respondents.*

---

**MOTION BY THE AMERICAN JEWISH COMMITTEE  
AND THE ANTI-DEFAMATION LEAGUE OF B'NAI  
B'RITH FOR LEAVE TO FILE A JOINT BRIEF AS  
AMICI CURIAE**

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# Supreme Court of the United States

October Term, 1962

No. 119

WILLIAM J. MURRAY, III, Infant, etc., *et al.*  
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SCHOOL DISTRICT OF ABINGTON TOWNSHIP, *et al.*  
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*Respondents.*

## MOTION BY THE AMERICAN JEWISH COMMITTEE AND THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH FOR LEAVE TO FILE A JOINT BRIEF AS *AMICI CURIAE*

The undersigned, as counsel for the American Jewish Committee and the Anti-Defamation League of B'nai B'rith respectfully move this Court for leave to file a joint brief as *amici curiae* in both above entitled cases.



The American Jewish Committee, founded in 1906, was incorporated by Act of the Legislature of the State of New York in 1911. Its Charter states:

The objects of this corporation shall be, to prevent the infraction of the civil and religious rights of Jews, in any part of the world; to render all lawful assistance and to take appropriate remedial action in the event of threatened or actual invasion or restriction of such rights, or of unfavorable discrimination with respect thereto \* \* \*

B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews, which represents a membership of more than 350,000 men and women and their families. The Anti-Defamation League was organized in 1913 as a section of the parent organization to advance goodwill and proper understanding between Americans and translate into greater effectiveness the ideals of American democracy. It is, therefore, dedicated to the protection of freedom of religion and combatting religious discrimination.

It has been among the fundamental tenets of the organizations which seek permission to appear as *amici curiae* herein that the welfare and the security of members of minority religious groups in the United States depend upon the preservation of constitutional guarantees for all; and that an invasion of the rights of any religious group is ultimately a threat to the religious freedom of all groups and to the individual members thereof.

It was in furtherance of this interest and belief that the movants herein participated as *amici curiae* in a num-

ber of cases before this Court bearing on church-state issues, including *McCollum v. Board of Education*, 333 U. S. 203 (1948); *Gallagher v. Crown Kasher Super-Market*, 366 U. S. 617 (1961); *Torcaso v. Watkins*, 367 U. S. 486 (1961); and *Engel v. Vitale*, 370 U. S. 421 (1962). In the last mentioned case this Court, upon motion by the American Jewish Committee and Anti-Defamation League of B'nai B'rith, granted permission to file a joint brief as *amici curiae*. *Engel v. Vitale*, 368 U. S. 982.

These cases place in issue the constitutionality under the First and Fourteenth Amendments of Bible reading and the recitation of the Lord's Prayer as part of the daily opening exercises in public schools in Maryland and Pennsylvania. While the constituencies of both of the *amici* include vast numbers of people who not only believe in the existence of God but devoutly worship Him, we believe that religious exercises and activities in our democratic society are matters for the home, synagogue and church, and not for the public schools. We wholeheartedly support the principle of separation of church and state as expressed in the First Amendment to the United States Constitution and interpreted by this Court, for the greater independence and strength of both these institutions. As organizations of persons professing a minority religious faith, we are particularly concerned with religious practices in the public schools which are consonant with and reflect the religious beliefs of the majority.

The questions presented by both cases are of great public interest. These are not merely disputes between private parties seeking to resolve their differences by litigation. The decisions in these cases may establish prece-

dents which would affect religious practices in the public schools throughout the country. The movants herein have nation-wide constituencies whose children attend the public schools. We believe that those for whom we speak—a substantial segment of a minority religious group—should be permitted to present their arguments in these important cases to assist this Court in resolving the issues.

If permission to file a brief as *amici curiae* is granted, we will confine our argument to the question of why the religious exercises involved in these cases are viewed by our constituencies as an establishment of religion in violation of the First Amendment and a denial of the equal protection of the laws in violation of the Fourteenth Amendment.

Our brief will show that the Bible, one part of which—the Old Testament—was given to the world by Judaism, now exists in several versions, each of which gives the Book a sectarian character, making it acceptable to one group and not to others. Similarly, the Lord's Prayer, which Jesus may have based upon Jewish sources, has become exclusively a Christian prayer.

Our brief will also argue that permitting the excuse of pupils whose parents object to their participation in the school-sponsored religious exercises, does not serve to free such exercises from the limitations of the establishment clause.

The attorneys for the petitioners below, who challenged the religious practices in the public schools here involved, have consented to our submitting a joint brief as *amici curiae* in both cases. So too have the Attorneys General of the State of Maryland and the Commonwealth of Penn-

sylvania. This motion is necessary because the attorneys for the respective boards of education, which defend the constitutionality of the practices here challenged, have advised us that they would neither consent nor object to our filing briefs *amici curiae*. This response no doubt reflects the recognition by the school boards that the issues in these cases are of great public moment and that the boards as public bodies should not obstruct organizations which also are concerned with the role of public education in our society from presenting their views to this Court.

Respectfully submitted,

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October 17, 1962

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# Supreme Court of the United States

October Term, 1962

No. 119

WILLIAM J. MURRAY, III, Infant, etc., *et al.*,  
*Petitioners.*

*against*

JOHN N. CURLETT, *et al.* and BOARD OF SCHOOL  
COMMISSIONERS OF BALTIMORE CITY,  
*Respondents.*

No. 142

SCHOOL DISTRICT OF ABINGTON TOWNSHIP, *et al.*,  
*Appellants.*

*against*

EDWARD LEWIS SCHEMP, *et al.*,  
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---

**MOTION BY THE AMERICAN ETHICAL UNION  
FOR LEAVE TO FILE A BRIEF AS  
AMICUS CURIAE**

---

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# Supreme Court of the United States

October Term, 1962

No. 119

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WILLIAM J. MURRAY, III, Infant, etc., *et al.*,

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SCHOOL DISTRICT OF ABINGTON TOWNSHIP, *et al.*,

*Appellants,*

*against*

EDWARD LEWIS SCHEMPF, *et al.*,

*Respondents.*

## MOTION BY THE AMERICAN ETHICAL UNION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

The American Ethical Union hereby respectfully moves for leave to file a brief *amicus curiae* in these cases. Counsel for the Petitioners in No. 119 and Counsel for the Respondents and for Intervenor-Appellants in No. 142 have consented to the filing by movant of a brief *amicus curiae* but counsel for the respective school boards, the Respondents



in No. 119 and the Appellants in No. 142, have advised that they would neither consent to nor oppose the filing of a brief *amicus*.

The American Ethical Union is a federation of Ethical Culture Societies and Fellowships in the United States, which, collectively, constitute a liberal religious fellowship known as the "Ethical Movement" or the "Ethical Culture Movement." There are now thirty Societies and Fellowships in eleven states and the District of Columbia, including the States of Maryland and Pennsylvania.

The American Ethical Union is a member of the International Humanist and Ethical Union, which held its third International Congress in Oslo in 1962. The International organization includes groups representing more than 24 countries, including the United States, Great Britain, Belgium, Holland, Austria, India, Norway, France, Germany, Japan and South Africa.

Ethical Culture is a religion and has been widely recognized as such. The Ethical Culture Societies and Fellowships conduct services and religious schools for children which meet regularly on Sunday mornings. The Leaders of the Ethical Culture Societies, some of them drawn from the ordained ministry of other religious groups, are required to have advanced degrees, post-graduate study in religion and philosophy and to take an intensive course of training before appointment and admission to the Fraternity of Leaders of the American Ethical Union. The Leaders provide the usual pastoral services customarily performed by ministers of religion, such as officiating at marriages, funerals and naming ceremonies, and counselling members of the Societies on ethical and moral problems.

The Ethical Movement believes that:

"Whether one does or does not believe in God, prayer or immortality, is one's own affair. Membership in an Ethical Society is not conditioned on acceptance or rejection of any one answer to such questions. In the Ethical Movement the good life and the rights and duties of human beings are looked upon as stemming from man's relations to man in the family of mankind." [Do YOU KNOW THE ETHICAL MOVEMENT?, pamphlet published by the American Ethical Union, 2 West 64th Street, New York 23, N. Y. p. 3.]

This Court has held non-theistic beliefs to be religions entitled to protection under the Fourteenth Amendment and has specifically recognized Ethical Culture as such a religion. *Torcaso v. Watkins*, 367 U. S. 488, n. 11; *Engel v. Vitale*, 368 U. S. 924. The American Ethical Union participated as *amicus curiae* in the *Torcaso* and *Engel* cases to present the position of the Ethical Culture Movement and other non-theistic religions.

The issue presented to the Court by these cases is whether public schools may lawfully include readings from the Bible or recitation of the Lord's Prayer as part of their daily opening exercises in the light of the First and Fourteenth Amendments to the Constitution of the United States. The interest of the American Ethical Union stems from its position as the ~~central~~ organization of the Ethical Culture Movement in the United States. The Ethical Culture Movement takes no doctrinaire position on prayer, on the writings found in any of the Holy Bibles or Scriptures of the world, or on the existence of a Supreme Being, but rather leaves to each of its members the freedom to decide the spiritual value of such matters on a personal basis.

4

Ethical Culture members hold differing views on these subjects. Their affiliation with the Ethical Culture Movement is founded upon their right to hold such beliefs and to be free of imposed religious dogma or religious exercises.

Reading from the Bible and reciting the Lord's Prayer are religious exercises of particular sects or denominations.

Members of Ethical Culture Societies in the States of Maryland and Pennsylvania and in other states throughout the United States have children attending public schools who are subjected to the practices here at issue. Such practices, therefore, directly infringe upon the rights of the parents and their children to follow their own religious beliefs and to be free of the imposition of the religious beliefs and practices of others.

Accordingly, we request permission to file a brief *amicus curiae* in these cases, in order to place before this Court considerations related to the effect of the decisions below on members, and children of members, of the Ethical Culture Movement and of other non-theistic religions.

Respectfully submitted,

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U.S. Supreme Court, U.S.  
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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1962

No. 119

WILLIAM J. MURRAY III, INFANT, BY MADALYN E.  
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AND CONSTITUTING THE BOARD OF SCHOOL  
COMMISSIONERS OF BALTIMORE CITY,  
*Respondents.*

ON WRIT OF CERTIORARI TO THE COURT OF  
APPEALS OF MARYLAND

**PETITIONERS' BRIEF**

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APPEALS OF MARYLAND

**BRIEF FOR PETITIONERS**

**CITATIONS TO OPINIONS BELOW**

The opinion of the Superior Court of Baltimore City, the court of first impression, is reported in the *Daily Record* (Baltimore), issue of June 12, 1961, and appears at R. 8.

The opinion of the Court of Appeals of Maryland is reported at 228 Md. 239, 179 A. 2d 698, the dissenting opinion at 228 Md. 251, 179 A. 2d 704. These opinions are set forth at R. 26 and R. 36, respectively.

## JURISDICTION

The final judgment of the Court of Appeals of Maryland, the court of last resort of that State, filed April 6, 1962, was entered on that same date (clerk's certificate, R. 47). Jurisdiction of this Court is invoked pursuant to 28<sup>th</sup> U.S.C. Sec. 1257 (3), there having been drawn in question below, and the Petitioners claiming here the matter of the validity of a statute of the State of Maryland upon the ground of its being repugnant to the First and Fourteenth Amendments to the Constitution of the United States, and the Petitioners having asserted below and claiming here, denial of rights, privileges, and immunities secured by the First and Fourteenth Amendments to the Constitution of the United States. The highest court of the State of Maryland, in its decision, ruled upon these said matters of validity, and of rights, privileges, and immunities, unfavorably to the Petitioners.

### CONSTITUTIONAL PROVISIONS, STATUTES, AND ADMINISTRATIVE REGULATIONS INVOLVED

This case involves the following:

1. A portion of Section 1 of the Fourteenth Amendment to the Constitution of the United States,

"... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. A portion of the First Amendment to the Constitution of the United States,

“(Congress) shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;”

3. A part of Article 77, Section 203 of the Annotated Code of Maryland (Michie, 1957) (Referred to in the Memorandum Opinion of the Superior Court of Baltimore City) (R. 3, 8),

“The Board of Commissioners of public schools of Baltimore City, or by whatever name the body may be known that has supervisory power and control over the public schools of Baltimore City . . .” (shall have certain powers and duties).

Also Section 202 of Article 77, which is by necessary inference a part of Section 203,

“The mayor and city council of Baltimore shall have full power and authority to establish in said city a system of free public schools which shall include a school or schools for manual or industrial training, under such ordinances, rules and regulations as they may deem fit and proper to enact and prescribe; they may delegate supervisory powers and control to a Board of School Commissioners; . . .”

And also Section 91 of the Charter and Public Local Laws of Baltimore City (Flack, 1949), drawn in by inference by Sec. 202, *supra*,

“Education, Department of, General Powers and Duties. (a) There shall be a Department of Education, the head of which shall be a Board of School Commissioners . . .”

4. Article VI, Section 6, of the Rules of the Board of School Commissioners of Baltimore City,

"Opening Exercises." Each school, either collectively or in classes, shall be opened by the reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer. The Douay version may be used by those pupils who prefer it . . ." (R. 4).

Also, an amendment to the above Rule, adopted November 17, 1960 by the Board, providing that,

"Any child shall be excused from participating in the opening exercises or from attending the opening exercises upon the written request of his parent or guardian." (R. 4).

5. The compulsory school attendance law of the State of Maryland as contained in Article 77 of the Annotated Code of Maryland (Michie, 1957):

"Sec. 231 (a) *Who must attend.* Every child residing in Baltimore City and in any county in the state between seven and sixteen years of age shall attend some day school regularly as defined in Sec. 233 of this article. . . . Every person having under his control a child between seven and sixteen years of age shall cause such child to attend school or receive instruction as required by this section. . . .

"(b) *Penalty.* Any person who has a child under his control and who fails to comply with any of the provisions of this section shall be deemed guilty of a misdemeanor, and be fined not exceeding five dollars for each offense."



### QUESTIONS PRESENTED

1. Does the conduct of daily opening exercises in the public schools of Baltimore City, consisting of a reading from the Bible, "and/or" recitation of the Lord's Prayer, as provided for by, and instituted under, Section 6 of Article VI of the Rules of the Board of School Commissioners of that City, which Rules were promulgated under a state statute giving the Board general supervisory powers over schools, violate any constitutional right of the Petitioners which is guaranteed by the Establishment and Free Exercise clauses of the First Amendment to the Constitution of the United States as made applicable to the States by the Fourteenth Amendment, or of the Equal Protection clause of the Fourteenth Amendment, even though provision has been made for excusing those pupils who do not wish to participate in the exercises?

2. Has the Rule above mentioned and the practice instituted under it in the public schools of Baltimore City by the Board of School Commissioners deprived the Petitioners of rights, privileges or immunities guaranteed by the Establishment and Free Exercise clauses of the First Amendment to the Constitution as made applicable to the States by the Fourteenth Amendment?

3. Is the decision below, holding the Rule and practice complained of to be constitutional, in conflict with the decisions of this Court concerning the free exercise of religion, the passage of laws respecting an establishment of religion, and concerning the separation of Church and State?

## STATEMENT OF THE CASE

The case was heard in the court of first impression without testimony, upon a demurrer to a petition for the issuance of the writ of mandamus commanding the Respondents herein to "rescind and cancel the . . . Rule" concerning opening exercises, "and to cause (the) teachers in Baltimore City to discontinue the practice and exercise . . . set forth." (R. 7).

The petition for mandamus (R. 3) alleged the state citizenship and residence of the Petitioners, the status of the adult Petitioner as a taxpayer and of the Infant Petitioner as a student; that both were subject to the compulsory school attendance statute of the state; the supervisory power of the Defendants over the public schools in question; the existence of the Rule promulgated by the Defendant Board of School Commissioners requiring the conduct of a daily sectarian religious "opening exercises", consisting of the reading, without comment, of one chapter of the Bible "and/or" recitation of the Lord's Prayer; and the enforcement of the Rule by the Defendants to the detriment of the Petitioners; the contravention of the rights of the Petitioners to freedom of religion under the First and Fourteenth Amendments and the violation of the principle of separation of Church and State; the violation of the constitutional rights of the Petitioners by threatening their religious liberty; the averment that the provision for being excused in no wise negated nor mitigated the violation and infringement of the Petitioners' constitutional rights; and the averment of the ill effects which the Infant Petitioner experienced as a result of his forced choice to be excluded from the exercises; the deprivation of equality under the laws; and the request to, and the refusal of, the Defendants that they cease from the religious practice protested against.

The Defendants demurred to the petition on the ground that mandamus was not the proper form of action, and that the petition stated no grounds for relief, on the theory that the questioned practice was not violative of the federal Constitution. Thereby, in law, the Defendants admitted the truth of all well-pleaded facts alleged in the petition.<sup>1</sup>

The demurrer was sustained by the *nisi prius* tribunal without leave to amend, the petition dismissed and judgment absolute for costs entered against the Petitioner (R. 2).

The Maryland Court of Appeals upheld that decision by a 4 to 3 majority, and the Petition for Certiorari herein was then filed.

Both the Infant Petitioner and the Individual Petitioner, his mother, are atheists (R. 4). The Infant Petitioner attends the public schools of Baltimore City (R. 3). The Defendant School Board is by statute charged with supervision and control of the Baltimore City public schools (R. 3). Under its rule making authority the Board established the disputed rule many years ago making the conduct of a short religious ceremony mandatory at the opening of each day of school.

The Petitioners, before filing their action below, had requested the Board to rescind its rule and to direct that the practice of holding the ceremony be discontinued by the teachers under its control. The practice was not stopped, nor the rule changed (R. 6). However, the Board did amend the rule so as to allow any pupil to be

<sup>1</sup> *Murray et. al. v. Curtlett et. al.* 228 Md. 239, 252, 179 A2d 698, 705. (This statement found in dissenting opinion. *Hillyard v. Cherry Chase Village*, 1958, 137 A2d 555, 215 Md. 213; *Walker v. D'Alessandro*, 1955, 126 A2d 148, 212 Md. 163; *Mahoney v. Board*, 1954, 108 A2d 143, 205 Md. 325.

excused from attendance at the exercises upon presenting the written request of his parent or guardian (R. 4). This the Infant Petitioner did, but thereafter, he suffered "loss of caste with his fellows, (was) regarded with aversion, and . . . subjected to reproach and insult", and was alleged to be subject to certain other substantial disadvantageous effects which followed from his exclusion from the classroom religious ceremony (R. 6). Therefore, upon the religious practice being continued as before (though without the Infant Petitioner's presence in the classroom), the action was brought.

### SUMMARY OF ARGUMENT

The questions herein are all within the compass of *Engel v. Vitale*<sup>2</sup> and *Torcaso v. Watkins*.<sup>3</sup>

For the public schools to require, daily, the recital of the Lord's Prayer or the reading of verses from the Bible, is unconstitutional under both the Free Exercise and the Establishment clauses of the First Amendment. The exercises are clearly sectarian and religious and the situation is *a fortiori* that discussed by this court in *Engel v. Vitale*, which concerned a more innocuous prayer, not taken from any particular religion, but merely composed and sanctioned by the school authorities, and did not involve a reading from a holy book.

### ARGUMENT

#### 1. That to which the Petitioners Do Not Object

The Petitioners wish to point out to the Court that they expressly disclaim any objection to such matters as the

<sup>2</sup> 370 U.S. 421

<sup>3</sup> 367 U.S. 488, 81 S. Ct. 1680, 6 L. Ed. 2d 982

use, in classes, of literature having a religious background, including the Bible in all or any of its versions, when such material is presented and discussed as literature or history; and to the discussion in class of religious history as history; and to the presentation of such subjects as comparative philosophy or comparative religion when presented as sociology, history, or philosophy, and not as a teaching of a specific religion; and to the display of religious symbols upon the person of students, or even in and about the school when such school display is made as decoration of an artistic nature, and not in the form of a religious devotional object; or to music in music classes or elsewhere though such music may have a religious history, or a religious connotation to some, provided it is presented or studied as music and not as a religious teaching. The Petitioners do not, in short, wish to curtail objective study or discussion of any subject, including religion, in the public school. What the Petitioners do object to is the sanctioning of favor for religion as opposed to non-religion, and to the conduct of religious teachings, whether such teachings be called sectarian or whether they be called non-sectarian.

## 2. In General

*My evangelistic brethren confuse an objection to compulsion with an objection to religion. It is possible to hold a faith with enough confidence to believe that what should be rendered to God does not need to be decided and collected by Caesar.*

*The day that this country ceases to be free for irreligion it will cease to be free for religion — except for the sect that can win political power. We start down a rough road when we begin to mix compulsory public education with compulsory godliness.*



So spoke Mr. Justice Jackson, dissenting, in *Zorach v. Clauson*, 72 S. Ct. 679, 343 U.S. 306, 96 L. Ed. 978. He also said:

*"I . . . challenge the Court's suggestion that opposition to this plan can only be antireligious, atheistic, or agnostic."*

Mr. Justice Jackson has stated the Appellant's principle argument, and Mr. Justice Black has reiterated it in *Engel v. Vitale*, 370 U.S. 421, 435, in stating that,

*"It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance."*

And at p. 430,

*" . . . the fact that the program, as modified and approved by state courts does not require all pupils to recite the prayer but permits those who wish to do so to remain silent or be excused from the room, ignores the essential nature of the program's Constitutional defects. Neither the fact that the prayer may be denominationally neutral, nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause of the First Amendment, both of which are operative against the States by virtue of the Fourteenth Amendment. Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom."*



The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not. *This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve the coercion of such individuals.* When the power, prestige, and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. . . .” (Emph. supp.)

### 3. The Lord's Prayer Is Sectarian

The Lord's Prayer is not “denominationally neutral” as the Regent's Prayer in *Engel v. Vitale* was claimed to be, *Engel v. Vitale, supra*, at 430. It is a Christian form of worship.<sup>4</sup>

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<sup>4</sup> “The Lord's Prayer (was) taught by Jesus to his Disciples (and) appears in two forms in the New Testament. The briefer, and probably older form is Luke 11:2-4. The longer form in Matthew 6:9-13 shows greater liturgical fulness, and ends with a doxology which was probably added in the first century to round out the prayer for public worship. Though the doxology appears in some versions of Matthew's Gospel and in the King James version, it is not found in the oldest and best Greek MSS., and is not included in the American Standard version or the Revised Standard version, except in a footnote.

“The context of the prayer differs in the two Gospels. In Matthew it is given as a model of prayer: ‘after this manner therefore pray ye’ (6:9); and it illustrates the teaching about prayer in the Sermon on the Mount (6:1-8). In Luke it is a form to be used: ‘When ye pray, say . . .’ (11:2). Here it is represented as Jesus' response to a disciple's request, ‘Lord, teach us to pray, as John also taught his disciples.’

It occurs twice in the New Testament. The fuller and more beautiful form is a part of the Sermon on the Mount<sup>5</sup>; the shorter version is found in St. Luke.<sup>6</sup> Catholic and

(cf. 5:33).” Harper’s Bible Dictionary by Miller & Miller (Harper & Bros., 1952), pp. 398-9.

K. Kohler, in *The Jewish Encyclopedia*, vol. 8, pp. 183-4 expresses the opinion that the Lord’s Prayer as it now stands is an insertion in Matthew from Didache 8:2 (a Christian manual of the 2nd century), and that the passage originally contained a saying identical with Mark 11:25, since the sequel in Matt. 6:14-15 is the same as Mark 11:26.

“The Lord’s Prayer has come to us from Jesus himself, and has always lain at the very heart of his religion. Churches have differed widely in every matter of doctrine and ritual and government, but all unite in the Lord’s Prayer. There has never been a time when it was not daily repeated by all Christians, alike in their common worship and their private devotion. It is the watchword by which they recognize each other, whatever may be their race or calling or their plane of culture. . . .” *The Lord’s Prayer*, E. F. Scott, D. D. (Scribner’s, 1951), p. 1.

“In both the Old Testament and the New there is a climactic point; . . . In the Old Testament it is the Ten Commandments. . . . In the New Testament it is the Lord’s Prayer, which lays foundations for the harmonious inner life, as the Ten Commandments do for the outer. Here speaks the aspiring spirit to its Maker. This is the love-song of the Christian world.” *The Lord’s Prayer*, George Herbert Palmer (Prof. Emer., Harvard) (Pilgrim Press, 1932), p. 3.

<sup>5</sup> Matt. 6:9-13: “Alter this manner therefore pray ye: Our Father which art in heaven, hallowed be thy name. Thy kingdom come. Thy will be done in earth: as it is in heaven. Give us this day our daily bread. And forgive us our debts, as we forgive our debtors. And lead us not into temptation, but deliver us from evil: For thine is the kingdom, and the power, and the glory, forever. Amen.”

<sup>6</sup> Luke 11:2-4: “And he said unto them, When ye pray, say, Our Father which art in heaven, Hallowed be thy name. Thy kingdom come. Thy will be done, as in heaven, so in earth. Give us day by day our daily bread. And forgive us our sins; for we also forgive every one that is indebted to us. And lead us not into temptation; but deliver us from evil.”

Protestant forms differ substantially<sup>7</sup>. The prayer is held by many authorities to owe much to Jewish liturgy and literature<sup>8</sup>, but is not generally regarded by Jewish clerics,

<sup>7</sup> Matt. and Luke op. cit., but in the Douay version of the Bible.

<sup>8</sup> Cf. for example I. Chron. 29:11: "Thine, O Lord is the greatness, and the power, and the glory, and the victory, and the majesty: for all that is in the heaven and in the earth is thine; thine is the kingdom, O Lord, and thou art exalted as head above all."

The Universal Jewish Encyclopedia (1942), Vol. 7 pp. 193-4 in an article by Rabbi Felix A. Levy, states "The composition of such a prayer by Jesus was not in itself a novelty, as private prayers of this type were not uncommon additions to the formal service in Judaism, and a number have been recorded (*Tos. Ber.* 3:7; *Ber.* 16b et seq.; *Yer. Ber.* iv, 7d) . . . . On the whole, with one or two possible exceptions, the Lord's Prayer may be said to have a Jewish tone. The Matthew verses resemble the opening phrases of the Kaddish prayer: Magnified and sanctified be His great name in the world which He hath created according to His will. May He establish His kingdom during your life . . . even speedily and at a near time. . . ."

"The opening words, 'Our Father,' are frequently found in the Jewish liturgy with or without the addition of the words 'in heaven' (Cf. *Chron.* 29:10, the fourth, fifth and sixth of the Eighteen Benedictions; the Abinu Malkenu prayer of The Penitential Days; *Ber.* 5:1; *Yoma* 8:9; *Sotah* 9:15; *Aboth* 5:20 and elsewhere). 'Your name be revered' and following verse are paralleled in the Kaddish and in the Kedushah. The two ideas of the hallowing of God's name and the coming of His kingdom are closely connected, as it was felt that the Messiah would come only when men would acknowledge the holiness of God. Jewish scripture is full of expressions of hope for the speedy coming of this Messianic redemption, and the words proposed by Jesus were based on the lively expectation of the promised kingdom in that very age.

"The next words, 'Your will be done,' are best understood in reference to this same Messianic hope; they are the expression of the trust that God will bring about His Kingdom in His own time. In a later period when the expected Messianic era did not arrive either in the lifetime of Jesus or in the first generations of the Christian church, the statement was first interpreted to refer to the second coming of Jesus (*Luke* 22:18) and then enlarged to include complete submission on

nor by many non-Jewish clerics as being a part of the liturgy of the religion of the Jews.<sup>9</sup>

the part of man to the will of God. This idea of submission is expressed frequently in Jewish literature, for instance in the prayer of Eliezer ben Hyrcanus recorded in the *Tosefta*: 'Do Thy will in Heaven above; grant tranquillity of spirit to those who fear Thee on earth (below) and do that which is good in Thy sight.' Both Jewish and Christian statements echo *Ps.* 135:6.

"The petition for daily bread which follows continues the Messianic thought. He who has faith and seeks the kingdom of God need have no fear for the day's sustenance or the morrow's. *Mechilta Vayassa* 3 (edit. Lauterbach, vol. 2, p. 103) reads: 'Rabbi Eleäzer (of Modin) used to say: He who has enough to eat for today and says, What shall I eat tomorrow? behold, he is of little faith.' *Sotah* 48b records a similar dictum: 'Rabbi Eliezer the Great declares: Whoever has a piece of bread in his basket and says, What shall I eat tomorrow? belongs only to those of little faith.' The words 'daily bread' are the *lehem hukki* ('mine allotted bread') of *Prov.* 30:8.

"The next sentence offers some difficulties, since the versions differ as to whether it is 'sins' or 'debts' that are to be forgiven. . . .

" . . . The next phrase, . . . 'Lead us not into temptation,' is found in the Orthodox daily prayer-book as part of the morning prayers recited at the beginning of the daily service. The passage is taken from *Ber.* 60b and reads: 'O lead us not into the power of sin or of transgression or iniquity or of temptation. . . .'. There is a similar statement in *Ber.* 16b, and the idea is frequent in Jewish prayers. . . .

"The closing doxology in *Matthew* ('Yours is the kingdom') is taken directly from *I Chron.* 29:11, which is used in the Orthodox Jewish liturgy at the time when the Scroll of the Torah is taken from the Ark. This doxology is not a general conclusion, but is connected with the prayer for forgiveness."

<sup>9</sup> For example, Rabbi Levy, in the article just cited (fnnt. 8) also states, "(The) Lord's Prayer is a series of petitions which is given this name because it was taught by Jesus as an example of the proper kind of prayer to be addressed to God. It is perhaps the most important prayer in the whole liturgy of the Christian faith. (Emphasis supplied) . . . From the discussion, . . . it can be seen that the Lord's Prayer owes much to Jewish thought. Many of its ideas are Jewish, and its phraseology closely resembles that uttered by Jewish teachers.

Therefore, not being "denominationally neutral", it falls more strongly than does the Regent's Prayer within the prohibition of *Engel v. Vitale*.

But the choice and grouping of the phrases is original and the whole bears the mark of the special Christian theology. It therefore is a Christian rather than a Jewish prayer."

Another (non-Jewish) authority has said "... if two say the same thing it is not the same," for while the Lord's Prayer can be used today by every Jew who may know nothing and wish to know nothing of Christ, yet it can only be properly offered by those who pray in the name of Jesus, and who know what is meant by praying in the name of the Crucified." J. Hausslater in *The New Schaff-Herzog Religious Encyclopedia* (Funk & Wagnalls, 1910), vol. 7, p. 21.

Another has held, petulantly, that "The sources of the prayer have often been discussed, and rabbinical parallels to the different petitions have been pointed out by . . . Lightfoot, Schoettgen, Vitringa, Wetstein, and others. But the parallels do not carry us very far. . . . Indeed, the prayer is free from anything that can be called purely Jewish." *A Dictionary of the Bible*, Hastings (Scribner's, 1950), vol. III, p. 142.

The Petitioners are not unaware of the contrary expert testimony given in *Schempp v. School District of Abington Township*, et. al., 177 F. Supp. 398, giving it as the opinion of the rabbis there testifying that the Lord's Prayer is acceptable to those of the Jewish faith. But even if these experts are correct, "acceptable" is not "comfortable"; and the prayer has a very strong Christian background. Furthermore, Petitioners' counsel is a Jew, and believes that every man is his own rabbi; counsel does not agree that the prayer is an acceptable prayer for Jews; counsel's personal feeling throughout his school days was that the "Lord" referred to in the title of the prayer was Jesus, and that the prayer was being offered by the school in fulfillment of the injunction of Jesus himself; as a Jew, counsel never felt right in following Jesus' direction as to use of a particular prayer, in spite of his agreement with most of the thought and spirit of the prayer; consequently counsel usually did not pray.

#### 4. The Bible Is Sectarian

Like the Lord's Prayer, the Bible is also sectarian. It is not accepted by Mohammedans, for example, whose holy book is the Koran nor by Buddhists, who have their Trypitaka.<sup>10</sup>

<sup>10</sup> Hawaii has probably 100,000 Buddhists in a population of half a million, according to Borden, in Hawaii, the 50th State, (McRae, Smith Co., 1960).

Apparently Buddhists are reluctant to contribute statistics. No figures are found in the World Almanac as to their numbers in Hawaii, and the Encyclopedia Britannica simply states "The Roman Catholic and Buddhist religions were the leading faiths in Hawaii at mid-20th-century" (1960, vol. 11, p. 267.)

Buddhism has various forms. Mahayana Buddhism, no doubt the dominant Hawaiian form, is polytheistic. Hinayana Buddhism is agnostic. Maurice Percheron in "Buddha and Buddhism" (Harper, 1954) says, "It may be acknowledged then that (Hinayana) Buddhism inherited a part of its spiritual aspirations from Brahmanism. What is peculiar to it is the authority given to man to gain his salvation without divine intervention. The ground had already been prepared by the fall of the old Vedic gods, which proved that a place in the celestial empyrean was not held in perpetuity. A Nietzsche before Nietzsche, the Buddha might well have uttered the axiom 'The gods are dead, man grows.' He attaches so much importance to the individual as to state outright that in order to gain Nirvana even the gods must undergo their last incarnation in the human state."

The "Encyclopedia Britannica" (1960) vol. 4, p. 326 states, "Four questions are recorded which it was held the Buddha had refused to answer. These are, whether the universe is eternal or not, whether it is finite or not, whether life is the same as the body, and whether one who is emancipated, (a Tathagata) exists after death. These are undetermined questions, and the fact that they were left unanswered has led to the system being called agnostic."

The polytheistic spirit of Mahayana Buddhism is indicated by Percheron in "The Marvelous Life of the Buddha" (1960), p. 18: "In Mahayana Buddhism Shakyamuni, (the Buddha) loses his historical character. He gives way to a pantheon of buddhas, who are considered redeemers and are endowed with divinity."



In fact, we can easily strike more closely to home than that, for depending upon which version of the Bible is being discussed, whether the Douay, the American Standard, the Revised Standard, the King James, the Jewish Publication Society Bible (which seems to have omitted the entire New Testament), that Bible is not acceptable to numerous sects both Christian and Jewish. (These two religions are mentioned simply by virtue of being "major" in terms of numbers in the United States). Members of the Jewish faith, for example, cannot accept any Biblical version containing the New Testament; Christians cannot accept a Bible which does not contain it.<sup>11</sup> Even if the Bible reading which is enjoined by the Rule of the school authorities in the instant case is always selected from the Old Testament, this selection is yet sectarian, and its reading constitutes a religious ceremony, interfering with the free exercise of the Petitioners' non-belief in a religion. As far as the Petitioners are concerned, the implication which the ceremony holds, is strongly to the effect that the Petitioners' non-belief in a religion (it is not lack of faith; Petitioners have strong faith in the moral principles listed in their petition for mandamus (R. 4)) is suspect, alien, of ill repute,

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<sup>11</sup>In *Schempp v. School District of Abington Township, et. al.*, 177 F. Supp. 398, the Pennsylvania District Court, in an Opinion by Biggs, J., after a painstaking inquiry, and a thorough examination of the expert evidence presented made certain detailed findings as a matter of law concerning the nature of the Holy Bible, and found that it is a sectarian document—"We find the operative facts in the instant case to be as stated by (the witnesses, including the experts)". The experts had made the statement paraphrased in the text above. They were Dr. Solomon Grayzel, a learned rabbi, Editor of the Jewish Publication Society, publisher of the Holy Scriptures according to the Masoretic Text, and Dr. Luther A. Weigle, Dean Emeritus of the Yale Divinity School and Chairman of the Committee for the Preparation of the Revised Standard Version. The discussion is most enlightening. See pp. 401-2 and esp. notes to the case nos. 13-21.

of a lesser moral quality than belief in some one religion, and to be condemned; none of which they admit, all of which they strenuously dispute.

**5. The First Amendment Prohibition Is an Absolute Prohibition. *Torcaso*; *Engel*; *West Virginia v. Barnette*.**

We are a secular democracy. The First Amendment was a most auspicious addition to the Constitution. Properly observed, by favoring no one system of belief over others, it favors all systems of belief, and all inquiry into belief. It seems that if one believes in the virtue of a free intellect, and if one believes that the Founding Fathers did also, then it follows that the First Amendment prohibition was meant to be an absolute prohibition,<sup>12</sup> and is best observed as an absolute prohibition.

In *Torcaso v. Watkins*, 367 U.S. 488, 81 S. Ct. 1680, 6 L. Ed. 2d 982, as in *Engel v. Vitale*, 370 U.S. 421, and as (in terms) in *Everson*; the court held (reiterating the language

<sup>12</sup> See Mr. Justice Rutledge's dissent in *Everson v. Board of Education*, 330 U.S. 1, 33-42. In *Engel v. Vitale*, Mr. Justice Douglas called the following comment of Mr. Justice Rutledge "durable First Amendment philosophy": "The reasons underlying the Amendment's policy have not vanished with time or diminished in force. Now as when it was adopted the price of religious freedom is double. It is that the church and religion shall live both with and upon that freedom. There cannot be freedom of religion, safeguarded by the state, and intervention by the church or its agencies in the state's domain or dependency on its largesse. Madison's Remonstrance, Par. 6, 8. The great condition of religious liberty is that it be maintained free from sustenance, as also from interferences, by the state." "Sustenance" obviously does not consist of money alone.

In addition, Mr. Justice Douglas stated (p. 443 of *Engel*): "The *Everson* case seems in retrospect to be out of line with the First Amendment."

of *Everson*, "Neither (a state nor the Federal Government) can pass laws which aid one religion, aid all religions, or prefer one religion over another." Thus, the Petitioners urge that reading the sacred writings of the Christian or Jewish religion,<sup>13</sup> or reciting the Lord's Prayer<sup>14</sup> would be a governmental preference in favor of Christianity or Judaism, thus denying those with other religious views the benefit of the "wall of separation of Church and State" called for in *Everson* and *Torcaso*, and thus "sanctioning official prayers" as expressly prohibited in *Engel v. Vitale*, *supra*, at 435.

In *Engel*, it was also pointed out (p. 429) that

"By the time of the adoption of the Constitution . . . many Americans . . . knew, some of them from bitter personal experience, that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its *official stamp of approval upon one particular kind of prayer or one particular form of religious services*. . . . Under (the First) Amendment's prohibition against governmental establishment of religion, as reinforced by the provisions<sup>3</sup> of the Fourteenth Amendment, government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity." (Emph. supp.)

Though this language was applied to the Regent's prayer in *Engel*, yet the Lord's Prayer, duly prescribed by law in

<sup>13</sup> See fnnts. 14, *supra*.

<sup>14</sup> See fnnts. 4, 9 *supra*.

the Maryland schools,<sup>15</sup> by that prescription becomes just as much an "official prayer" as any "composed" prayer, and certainly the entire service, carefully outlined by law, consisting of the prayer plus Bible reading is "one particular form of religious service."

In the Second Flag Salute Case, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 87 L. Ed. 1628, 63 S. Ct. 1178, it was held:

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or require free citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."

In *Torcaso v. Watkins*, *supra.*, it was stated:

"Neither (a state nor the Federal Government) can force nor influence a person 'to . . . profess a belief or disbelief in any religion'. No person can be punished for entertaining or professing religious beliefs or disbeliefs. . . . (Emph. supp.)"

" . . . Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on

<sup>15</sup> "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. . . . That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *West Virginia v. Barnette*, 330 U.S. 624, 87 L. Ed. 1628, 63 S. Ct. 1178, 1185.

a belief in the existence of God as against those religions founded on different beliefs."<sup>16</sup>

**6. Factors Relating to Compulsion are "Activated" by a Parent Acting to Have a Child Excused from the Ceremony**

To require a child to obtain written permission from his parents to be excused from the religious ceremony, indeed, merely to require a child to absent himself from the ceremony, whether by coming to class on time and then leaving, or by attending class each day after the performance of the ceremony is completed, or even to metaphorically absent himself by sitting silent or standing silent while others pray or listen, is to require him to "confess by word or act" and is to "force or influence" him "to . . . profess a belief or disbelief in (a) religion."

This argument is offered in spite of Mr. Justice Douglas' feeling, expressed in his concurring opinion, that *Engel* did not involve compulsion in any way. The very fact that a child brings a note from his parent requesting either that he be excused from remaining in the room, or perhaps only excused from standing, or from reciting, will, in most instances, it is respectfully suggested, cause either subtle or outspoken disapproval from some teachers regardless of any bona fide steps which may be taken by school authorities to prevent such disapproval. School teachers are not notably broad minded as a group. As a group, they even have their fair share of bigots and religious fanatics of varying degree. And if this can be

<sup>16</sup> *Ftnt. 11* at 81 S. Ct. 1684 states, "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others. (References cited)."



conceded, then it would follow that disapproval will equal compulsion in many cases.

A child's fellow students can be expected to be no better. Some may in future years turn out to be judges, physicians, morticians, bread salesmen, appliance repairmen, and members of other such learned professions; others, surely, will become panhandlers, con-men, lawyers, newspapermen, and members of other callings of like ill-repute; at school age all are mixed together and all are without benefit of the maturity, further education and wisdom which will in some degree act on all at a future time. Consequently, this disapproval, which may surely be expected to attend the proffer of permission to be excused from the exercises, likewise will, and even more strongly, probably, be expressed in ways constituting compulsion, or pressure to conform.

#### **7. Both the Establishment and Free Exercise Clauses Are Invoked.**

The *Torcaso* case, and the language quoted above (pp. 20-21), was based on the Establishment Clause; the *Barnette* case made no statement as to which First Amendment clause was invoked but would seem to have dealt with the Free Exercise Clause<sup>17</sup>; the *Engel* case stood at least upon the Establishment Clause.<sup>18</sup>

(*McGowan v. Maryland*, 366 U.S. 420, 81 S. Ct. 1101, 1153, 1218, 6 L. Ed. 2d 393 seems to indicate that the question of which clause is involved concerns particularly the question of *standing* to maintain the action; that where

<sup>17</sup> For example, Mr. Justice Murphy, concurring, said "official compulsion to affirm what is contrary to one's religious belief is the antithesis of freedom of worship ..."

<sup>18</sup> See particularly pp. 430, 431.



the litigant's own religious freedom was not infringed by Sunday closing laws, the Free Exercise Clause could not be invoked: that if an establishment of religion by the government was effected, and this effectuation was alleged to cause the litigant economic disadvantage, he had standing to challenge the statute causing him that disadvantage.)

Both clauses, it is urged, may be invoked by the Petitioners here, and both clauses prohibit the practices complained of.

In *McGowan*, Mr. Justice Frankfurter, concurring, said

"... with foresight, those who drafted and adopted the words, 'Congress shall make no law respecting an establishment of religion,' did not limit the constitutional proscription to any particular, dated form of state-supported theological venture. The Establishment Clause withdrew from the sphere of legitimate legislative concern and competence a specific, but comprehensive, area of human conduct: man's belief or disbelief in the verity of some transcendental idea and man's expression in action of that belief or disbelief. Congress may not make these matters, as such, the subject of legislation, nor, now, may any legislature in this country. Neither the National Government nor, under the Due Process Clause of the Fourteenth Amendment, a State, may, by any device, support belief or the expression of belief for its own sake, whether from conviction of the truth of that belief, or from conviction that by the propagation of that belief the civil welfare of the State is served, or because a majority of its citizens, holding that belief are offended when all do not hold it.

"With regulations which have other objectives the Establishment Clause, and the fundamental concept which it expresses, are not concerned. These regulations may fall afoul of the constitutional guarantee against infringement of the free exercise or observance of religion. Where they do, they must be set aside at the instance of those whose faith they prejudice. But once it is determined that a challenged statute is supportable as implementing other substantial interests than the promotion of belief, the guarantee prohibiting religious 'establishment' is satisfied.

"... If the primary end achieved by a form of regulation is the affirmation or promotion of religious doctrine—primary, in the sense that all secular ends which it purportedly serves are derivative from, not wholly independent of, the advancement of religion—the regulation is beyond the power of the state. This was the case in *McCullum*. Or, if a statute furthers both secular and religious ends by means unnecessary to the effectuation of the secular ends alone—where the same secular ends could equally be attained by means which do not have consequences for promotion of religion—the statute cannot stand. . . ."

In *McGowan* it was determined that Sunday closing laws were health and welfare statutes, and not, in intrinsic intent, an incursion by the states into the area of religious observance.

However, in the case at hand, by the rules laid down by Mr. Justice Frankfurter, both the Establishment Clause is violated by the Defendant School Board's Rule which does not implement any other substantial interest than the promotion of belief; and the Free Exercise Clause, which

is violated by virtue of the adverse effect which the Rule and practice complained of, has on the Infant Petitioner due to his non-belief in a religion, and which Rule and practice are here challenged by one "whose faith they prejudice."

Mr. Justice Douglas, in dissenting in *McGowan* on the application of First Amendment principles to the facts there said,

"But those who fashioned the First Amendment decided that if and when God is to be served, His service will not be motivated by coercive measures of government. 'Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof'—such is the command of the First Amendment . . . . This means, as I understand it, that if a religious heaven is to be worked into the affairs of our people, it is to be done by individuals and groups, not by the Government.<sup>19</sup> This necessarily means,

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<sup>19</sup> This statement, it would seem, is itself an answer to Mr. Justice Douglas' disturbing contention, raised in *Engel v. Vitale*, that this Court, state legislatures, and the Houses of Congress, are in violation of the Establishment Clause in opening their sessions with a prayer conducted by a chaplain or other person on the public payroll. This problem, of ceremonial invocations, also, apparently, was a principal factor in causing Mr. Justice Stewart to dissent in the same case. But Congress, state legislatures, and this Court are autonomous bodies. They are bodies which clearly have large inherent or explicit powers giving them the right to establish their own rule of procedure, and if they wish, to establish, for example, rules which they themselves will voluntarily observe; as to dress, time of meeting, the decoration of their furniture and their chambers, and of the ceremonies which they, as an autonomous group, wish to observe in the conduct of their business. The members of Congress can, it seems, neither force me to attend their meetings as a spectator, nor, if I do attend, to participate in their prayers, but I, not having been

*first*, that the dogma, creed, scruples, or practices of no religious group or sect are to be preferred over

elected to that august body, and not being a member thereof, could not, I would think, tell them not to pray, nor what to wear, nor where to sit, nor what parliamentary rules to adopt. Likewise, if I were a member of Congress, I could not prevent it from collectively, as a voluntary body of individuals, deciding, by proper parliamentary procedure, to pay a chaplain to conduct prayers out of moneys given it to use, in its unrestricted discretion, for the ordinary conduct of its daily business and proceedings. A child compelled to attend school under compulsory public education laws is in a different situation from one who volunteers for public service. Certainly there would be no problem if the chaplains were paid by the members of Congress from their private funds, or if they were unpaid.

Insofar as no finite increment in teacher's salaries nor in educational capital costs can be attributed to the conduct of prayer services, the Petitioners deny that their right to challenge the ceremonies is based on any additional costs being thereby added to the cost of public education. They believe too fervently in the absolute importance of secular democratic schools to believe that only monetary aid is encompassed within the Establishment Clause prohibition.

Petitioners do not deny however, that the provision of military chaplains in the armed forces, where service is compulsory, and where the members of those forces do not themselves determine the existence or establishment of the services of chaplains, of chapels, of religious services and the like, may be unconstitutional.

Yet, it certainly can be argued that the provision of paid chaplains as a matter of convenience and comfort for the military men they serve is no more unconstitutional than the provision of blankets, of shoes, of a post exchange or a post library. No one, presumably, is forced by his superior officers to avail himself of any of these facilities, and the use of the post chaplain by an individual is no more the conduct of a religious ceremony for the group as a whole, than is individual use of the library. A distinction can easily be drawn, in this instance, between use of religious facilities because of an order from above or a request from below. Moreover, the school is only a part of a child's environment; an isolated army post may be a military man's entire environment, and all of his normal needs must be drawn from that environment.

those of any others; *second*, that no one shall be interfered with by government for practicing the religion of his choice; *third*, that the state may not require anyone to practice a religion or even any religion; and *fourth*, that the State cannot compel one so to conduct himself as not to offend the religious scruples of another. The idea, as I understand it, was to limit the power of government to act in religious matters (West Virginia . . . v. Barnette . . . McCollum v. Board . . .), not to limit the freedom of religious men to act religiously nor to restrict the freedom of atheists or agnostics."

#### 8. Religious Discrimination, or Religious Segregation (*Brown v. Board of Education*).

Moreover, wholly aside from constitutional provisions expressly applicable to religion, the Equal Protection Clause of the Fourteenth Amendment prohibits any significant state discrimination which is not based on reasonable classification. In the cases involving racial segregation (*Brown v. Board of Education* (1954), 347 U.S. 483, 74 S. Ct. 686), this court has emphasized the importance of equal treatment in our public schools. The Court observed that formal education is "perhaps the most important function of state and local governments", is "the very foundation of good citizenship," and is virtually indispensable to individual success in life.

"Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." (*Brown v. Board, supra*; 347 U.S. at 493; 74 S. Ct. at 691.)

The court then considered the effect of racial segregation upon children and found that it:

"... generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone . . . . A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system." (347 U.S. at 494, 74 S. Ct. at 691.) (Brackets by the Court.)

The Petitioners contend that the religious discrimination present in classroom reading of the Bible, and particularly that involved in excusing or dismissing one or several children from the class during such reading would be wholly as severe in its social and psychological effects as the racial discrimination which was before the Court in the segregation cases, and that such segregation on a religious basis is wholly prohibited by the decision in the segregation cases.

To call upon children to participate in prayers which are contrary to their parents' belief (or in the alternative to require them to profess their non-belief) is thus a material, not a mere incidental, encroachment upon the separation of Church and State. Especially in the case of very young children, their right to absent themselves during such prayers would seem to be inadequate protection from the very real though subtle pressure which the endorsement of school and teacher would produce.



## 9. Jonah, the Whale and Ninevah's Repentance; Jonah Sheds a Tear for a Gourd

*Engel v. Vitale*, judging from the public reaction, was severely traumatic reading for many citizens. Following the decision, legislation to repeal the First Amendment was proposed in Congress,<sup>20</sup> hands were wrung in pulpits across the land, the Baltimore City Council undertook to advise the Senate what to do,<sup>21</sup> and letters were written to newspaper editors throughout the country suggesting that the Republic was tottering. But for what? For a prayer<sup>22</sup> conducted daily, automatically, and in public, not in the heart.<sup>23</sup> For this, many are ready to cancel the first of the first ten safeguards of the rights of the nation's people.

One is reminded of the story of Jonah,<sup>24</sup> that foolhardy and self-centered man, who with great reluctance, and only after his tribulation in the belly of the fish, finally heeded God's word, and went to Ninevah to preach to its inhabitants as he had been commanded to do. To Jonah's great surprise, the people of Ninevah repented; they "turned from their evil way", and so "God repented of the evil that he had said he would do unto them; and he did it not." Jonah, however, was "displeased . . . exceedingly . . . and he was very angry." After some words

<sup>20</sup> New York Times, June 27, 1962 pp. 1, 20; June 28, 1962, p. 17.

<sup>21</sup> The Sun (Baltimore), June 27, 1962; July 13, 1962.

<sup>22</sup> Napoleon is reported to have said, "Do you wish to see that which is really sublime? . . . Repeat the Lord's Prayer" John S. C. Abbott, *The History of Napoleon Bonaparte* (1855) . . . But A. Buttrick in *So We Believe, So We Pray* (1911) comments, "Apparently that was all he did; he only repeated it. So it left no deep mark on his conduct."

<sup>23</sup> " . . . thou, when thou prayest, enter into thy closet, and when thou hast shut thy door, pray to thy Father, which is in secret; . . ." Matt. 6:6.

<sup>24</sup> Jonah 1-4.

with God, he went to sit on a hill on the east side of the city to see what would become of Ninevah, apparently believing he may have changed God's mind. As Jonah sat in the booth he had made, God caused a gourd to grow over it, for shade. Then God sent a worm to destroy the gourd, and when "the sun beat upon the head of Jonah" he was enraged. "God said to Jonah, Doest thou well to be angry for the gourd? . . . Thou hast had pity on the gourd, for which thou hast not labored, neither madest it grow; which came up in a night and perished in a night: And should I not spare Ninevah, that great city, wherein are more than sixscore thousand persons that cannot discern between their right hand and their left hand; and also much cattle."

And so, the critics of the First Amendment. They weep for a prayer and religious practice in the schools, which should never have been allowed to become established in the first place, and which is of minor importance to the moral life of the people; but they do not even blink at the threat which the practice poses to the Constitution, to the Bill of Rights, and consequently to the welfare of the nation's 180 million inhabitants which these institutions fundamentally protect.

### CONCLUSION

The Petitioners request that the judgment of the Maryland Court of Appeals be reversed, and the case remanded for such other proceedings as are proper in a mandamus action.

Respectfully submitted,

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# Supreme Court of the United States

October Term, 1962

No. 119

WILLIAM J. MURRAY, III, Infant, et al.,

*Petitioners,*

*against*

JOHN N. CURLETT, et al. and BOARD OF SCHOOL  
COMMISSIONERS OF BALTIMORE CITY,

*Respondents.*

No. 142

SCHOOL DISTRICT OF ABINGTON TOWNSHIP, et al.,

*Appellants,*

*against*

EDWARD LEWIS SCHEMPF, et al.,

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## BRIEF OF AMERICAN JEWISH COMMITTEE AND ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AS AMICI CURIAE

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## BRIEF OF AMERICAN JEWISH COMMITTEE AND ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AS AMICI CURIAE

### Interest of the Amici

The American Jewish Committee, founded in 1906, was incorporated by Act of the Legislature of the State of New York in 1911. Its Charter states:

The objects of this corporation shall be, to prevent the infraction of the civil and religious rights of Jews.

in any part of the world; to render all lawful assistance and to take appropriate remedial action in the event of threatened or actual invasion or restriction of such rights, or of unfavorable discrimination with respect thereto . . .

B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews, which represents a membership of more than 350,000 men and women and their families. The Anti-Defamation League was organized in 1913 as a section of the parent organization to advance goodwill and proper understanding between Americans and translate into greater effectiveness the ideals of American democracy. It is, therefore, dedicated to the protection of freedom of religion and combatting religious discrimination.

It has been among the fundamental tenets of the organizations which appear as *amici curiae* herein that the welfare and the security of members of minority religious groups in the United States depend upon the preservation of constitutional guarantees for all; that an invasion of the rights of any religious group is ultimately a threat to the religious freedom of all groups and to the individual members thereof.

These cases place in issue the constitutionality under the First and Fourteenth Amendments of Bible-reading and the recitation of the Lord's Prayer as part of the daily opening exercises in public schools in Baltimore and Pennsylvania.

The constituencies of both of the *amici* include vast numbers of people who not only believe deeply in the existence of God but devoutly worship Him. Our children receive their religious instruction and observe their religious



ceremonies at home, in the synagogues and religious schools, since we believe that religious exercises and activities in our pluralistic society are matters for the home, synagogue and church, and not for the public school. We wholeheartedly support the principle of separation of church and state as expressed in the First Amendment to the United States Constitution and interpreted by this Court, for the greater independence and strength of both those institutions.

Paul Hutchinson, one-time editor of *Christian Century*, made the following perceptive comment on the significance of separation of church and state in the United States as a source of strength for the institutions of religion:

...there has been no "establishment of religion," no state church with tax support, no interlocking of the official machinery of the church with the official machinery of the government. The churches have been on their own, growing by their own efforts—which largely accounts for that interest in revivalism and "activism" that has exposed them to criticism from European churches under no necessity to support themselves.

This is something unknown in organized Christianity since the edict of Theodosius I in 380 A.D. made political loyalty and membership in the Christian church virtually synonymous. For 1,400 years after that, membership in the church and in the state was regarded as two aspects of the same thing—which was one reason for brutal treatment of the Jews. This was as true in the Protestant states which emerged from the Reformation as in the Catholic monarchies. But the United States, from its infancy as a nation, returned to the conception of the Christian church as it was before Constantine, when men joined of their

own free will and supported it of their own voluntary desires, and the Church in consequence was a free institution. Judged by what has followed, the American adoption of the principle of church and state separation has been a godsend for the churches, Protestant, Roman Catholic and of every sort. The voluntary principle has gained, in the friendly American climate, an impressive pragmatic sanction. Hutchinson, Paul, "The Onward March of Christian Faith," *Life Magazine*, December 26, 1955, 43.

As organizations of persons professing a minority religious faith, we are particularly concerned with religious practices in the public schools which are consonant with and reflect the religious beliefs of the majority.

State agencies, by mandating prayer and Bible-reading as part of the opening exercises in the public schools, sought to satisfy the demands of those who insist on the introduction of religious practices in the public schools, concededly out of good motives. The *amici curiae*, however, believe that a state agency is not equipped, qualified or competent to evaluate the spiritual needs of the students attending public schools or to establish the means to satisfy such needs.

Any attempt by public school authorities to provide for religious needs of children committed to their care must necessarily involve them in such tormenting and divisive questions of doctrine and dogma as, for example, deciding which version of the Bible ought to be used and which passages should and which should not be read.

Any decision legalizing religious ceremonies in the public schools must inevitably open a Pandora's box of problems for those school authorities who are, as they

should be, conscious of the religious sensibilities of the children entrusted to their care.

Freedom of religious belief, observance and worship can remain inviolate only so long as there is no intrusion of religious authority in secular affairs or secular authority in religious affairs. Each breach in this separation of role and function tends to beget additional breaches and, hence, the American Jewish Committee and the Anti-Defamation League of B'nai B'rith are opposed to any and all forms of establishment of religion by which a state agency undertakes to provide for the religious needs of children.

For these reasons, the two organizations join in filing this brief *amici curiae* with the permission of this Court.

### **§ Statement of the Case**

#### **a. *Murray v. Curlétt*, No. 119**

William J. Murray, III, a student attending Woodbourne Junior High School in the City of Baltimore, and his mother, commenced this action in the Superior Court of Baltimore City for a writ of mandamus to bar from the public schools of that city "the reading without comment of a chapter in the Holy Bible and/or the use of the Lord's Prayer." That practice is required as part of the opening exercise in the public schools by a regulation of the Board of School Commissioners of Baltimore. Adopted originally in 1905, it read as follows:

Opening Exercises. Each school, either collectively or in classes, shall be opened by the reading, without comment, of a chapter in the Holy Bible and/or the

use of the Lord's Prayer. The Douay version may be used by those pupils who prefer it. Appropriate patriotic exercises should be held as a part of the general opening exercise of the school or class. Rules of the Board of School Commissioners, Article VI, Section 6.

On November 17, 1960, the Board amended the aforesaid regulation by adding the following sentence:-

Any child shall be excused from participating in the opening exercises or from attending the opening exercises upon written request of his parent or guardian.

The petitioners contended that the regulation, both originally and as amended, contravened their freedom of religion under the First and Fourteenth Amendments of the United States Constitution in that it violated the principle of separation between church and state.

The Superior Court of Baltimore City dismissed the petition on demurrer and the petitioners appealed to the Court of Appeals of Maryland. That Court affirmed the lower court ruling by a four-to-three decision, holding that "the daily opening exercises of the Baltimore City public schools—wherein the Holy Bible is read and the Lord's Prayer is recited"—did not violate plaintiffs' constitutional rights. *Murray v. Curlett*, 228 Md. 239 (1962).

This Court granted the petition for a Writ of Certiorari on October 8, 1962. — U. S. —.

**b. School District of Abington Township v. Schempp,  
No. 142**

Mr. & Mrs. Edward Lewis Schempp, as parents and natural guardians of three children attending the public schools in Abington Township, Pennsylvania, commenced this action in the Federal District Court for the Eastern District of Pennsylvania. They attacked the constitutionality of a statute of the Commonwealth of Pennsylvania which read as follows:

At least ten verses from the Holy Bible shall be read, or caused to be read, without comment, at the opening of each public school on each school day, by the teacher in charge; Provided, That where any teacher has other teachers under and subject to direction, then the teacher exercising such authority shall read the Holy Bible, or cause it to be read, as herein directed.

If any school teacher, whose duty it shall be to read the Holy Bible, or cause it to be read, shall fail or omit so to do, said school teacher shall, upon charges preferred for such failure or omission, and proof of the same, before the board of school directors of the school district, be discharged. 24 P. S. Pa. Sec. 15-

1516

The complaint alleged that the statute is unconstitutional as an establishment of religion and a prohibition of the free exercise thereof. The complaint also alleged that the practice as followed in the public schools of Abington Township of reciting the Lord's Prayer in conjunction with the reading of the ten verses of the Holy Bible, is unconstitutional for the same reasons. It sought a declaratory judgment and injunction against the practice complained of. A three-judge court was convened pursuant to 28 U. S. C.

Sees. 2281, 2284. It unanimously declared the Pennsylvania statute unconstitutional under the Establishment and Free Exercise Clauses of the First Amendment. It also struck down as unconstitutional, on the same grounds, the combined practice of Bible-reading and mass recitation of the Lord's Prayer by students in the public schools of Abington Township. *Schempp v. School District of Abington Township*, 177 F. Supp. 398 (1959).

The School District of Abington Township appealed to this Court. While that appeal was pending, the General Assembly of Pennsylvania enacted Act No. 700, Laws of 1959, which became effective on December 17, 1959. That Act amended 24 P. S. Pa. Sec. 15-1516 to read as follows:

At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian.

After the enactment of that amendment, this Court on October 24, 1960, in a *per curiam* opinion vacated the Federal District Court judgment and remanded the case to that Court "for such further proceedings as may be appropriate in light of Act No. 700 . . ." *School District of Abington Township v. Schempp*, 364 U.S. 298 (1960).

Following a new hearing, the 3-judge court declared the Pennsylvania statute, as amended, unconstitutional. In contrast to its first decision which relied on both the Establishment and the Free Exercise Clauses of the First Amendment, the second decision of the District Court was based exclusively on the Establishment Clause. It further struck down as unconstitutional under the Establishment Clause the combined practice of Bible-reading and mass



recitation of the Lord's Prayer by students in the public schools. *Schempp v. School District of Abington Township*, 201 F. Supp. 815 (1962).

The School District again appealed to this Court which, on October 8, 1962, noted probable jurisdiction and set the case for argument immediately following the argument in *Murray v. Curlett*. — U.S. —.

### **The Question Presented**

These cases present this Court with the question whether readings from the Holy Bible and the recitation of the Lord's Prayer, conducted by school authorities as part of the opening exercises at the beginning of each school day in the public schools of the City of Baltimore and the Commonwealth of Pennsylvania, constitute an establishment of religion in violation of the First and Fourteenth Amendments of the United States Constitution. Since the practices are based on a school board regulation in one case and a state statute in the other, the constitutionality of such regulation and statute are necessarily drawn in question.

These cases do not question the propriety or constitutionality of the use of the Bible in the teaching of secular subjects which are part of the regular school curriculum.

### Summary of Argument.

Reading of a chapter or ten verses from the Holy Bible without comment and the recitation of the Lord's Prayer, conducted by the school authorities as part of the opening exercises in the public schools of Baltimore and Pennsylvania, is a religious and sectarian exercise. Such exercises, because of their form, regularity, absence of comment and other surrounding circumstances, are vested with a ceremonial significance which has the effect of creating a religious atmosphere and religious expression. Such atmosphere and expression, in these cases, are essentially Christian.

The use of the Holy Bible in those exercises must not be confused with its use as a source or reference book in the teaching of secular subjects such as literature, history, art and social studies.

The Establishment Clause of the First Amendment, made applicable to the states by the Fourteenth Amendment, prohibits public school authorities from sponsoring or conducting religious exercises in such schools. *A fortiori*, religious practices which are sectarian are also barred. State statutes and administrative regulations which require such practices to be conducted in the public schools are unconstitutional, whether or not provision is made for the excuse of children who, or whose parents, object to the practice on the grounds of conscience.

Manifestations of belief in God in our public life, such as the invocation of God's blessings at the commencement of legislative sessions and court proceedings are not involved in the cases at bar.

A number of state court decisions, which uphold public school practices similar to those in issue here, are based on fallacious reasoning.

## ARGUMENT

### POINT I

**The daily reading of a chapter or of ten verses of the Holy Bible, without comment, and the recitation of the Lord's Prayer in the public schools of Baltimore and Pennsylvania, is a religious and sectarian ceremony.**

#### A. Recitation of the Lord's Prayer

The Lord's Prayer is a portion of the New Testament. It is found in the Gospel according to St. Matthew, Chapter 6, Verses 9-13, as part of the Sermon on the Mount.<sup>1</sup> In the Sermon, Jesus prescribed what is now known as the Lord's Prayer as a prayer for his followers.

The form of the Lord's Prayer, which appears in the King James version of the Holy Bible, originally published in 1611 and generally accepted as the Protestant version, reads as follows:

Our Father which art in heaven, Hallowed be thy name.  
Thy kingdom come. Thy will be done in earth, as it is  
in heaven.

Give us this day our daily bread.

And forgive us our debts, as we forgive our debtors.  
And lead us not into temptation, but deliver us from  
evil: For thine is the kingdom, and the power, and  
the glory, for ever. Amen.

The Lord's Prayer, as it appears in the *Book of Common Prayer* used by the Protestant Episcopal Church in the United States, generally follows the King James ver-

<sup>1</sup> An abbreviated form of the Lord's Prayer is also found in the Gospel according to St. Luke 11:2-4.

sion except that it substitutes "trespasses" for "debts" and "those who trespass against us" for "our debtors."<sup>2</sup>

The version of the Lord's Prayer used by Roman Catholics appears in their prayer books as follows:

Our Father, who art in heaven, hallowed be Thy name: Thy kingdom come: Thy will be done on earth as it is in heaven: Give us this day our daily bread: and forgive us our trespasses as we forgive those who trespass against us. And lead us not into temptation: but deliver us from evil. Amen.

Jehlicka, Rev. Dr. Francis, *Graded Catechism*, William N. Sadler, New York, 1925 (Imprimatur: Patrick Cardinal Hayes, Archbishop, New York) 231.

This version of the Lord's Prayer is derived from the Gospel according to St. Matthew<sup>3</sup> as it appears in the Douay version of the Holy Bible which was originally published by the English Colleges at Rheims and Douay in 1582 and 1609, respectively, and which is the officially accepted Roman Catholic version. A conspicuous difference between the Protestant and Catholic versions of the Lord's Prayer is the absence in the latter of the doxology.<sup>4</sup>

Although some of the language in the Lord's Prayer may be traceable to Jewish sources, the prayer "is a Christian rather than a Jewish prayer." *Universal Jewish Encyclopedia* 193. In fact it is probably the best known and most widely used Christian prayer.

2. *Book of Common Prayer*, according to the use of the Protestant Episcopal Church in the United States of America, printed for and presented by the New York Bible and Common Prayer Book Society, Oxford University Press, New York (1935) 7 and 587.

3. As in the King James version of the Bible, an abbreviated form of the Lord's Prayer also appears in the Douay Bible in the Gospel according to St. Luke 11.2-4.

4. "For thine is the kingdom, and the power, and the glory."

The Gospel according to St. Matthew, where the Lord's Prayer originally appeared, like the balance of the New Testament, is not accepted by Jews as part of their Holy Scriptures. The divinity of Jesus, on which Christianity is based, and which explains the designation of the prayer as the "Lord's Prayer," is rejected by Jews. 3 *Universal Jewish Encyclopedia* 486. The very context in which the Lord's Prayer appears in the Gospel according to St. Matthew shows that it was propounded by Jesus and expressly distinguished from the customary prayers offered in the synagogues of the Holy Land at that time.

In *Doremus v. Board of Education* the Supreme Court of New Jersey described the Lord's Prayer as "enjoined by Christ as an appropriate form of prayer." It conceded that the prayer is used by Roman Catholics and Protestants, though "with slight variations." The Court went on to suggest that the Lord's Prayer could or should also be acceptable to Jews because "Christ was a Jew and He was speaking to Jews." *Doremus v. Board of Education*, 5 N. J. 435, 450, 451 (1950), appeal dismissed 342 U. S. 429 (1952). The Court overlooked the fact that, in contrast to Protestants and Roman Catholics, Jews do not accept the divinity of Jesus.

\* \* \* under no circumstances would Jews ever consider the Lord's Prayer to be any but a Christian prayer. Whereas it is true that the ideas and the words are taken from Jewish tradition, nevertheless, the form in which it is recited, the status attached to it and the associations it recalls are part of the Christian and not the Jewish tradition. The very title is Christian, "the Lord's" referring to Jesus and not to God as Jews conceive Him. *Statement of Reform*

Judaism<sup>5</sup> submitted by Rabbi Richard G. Hirsch to the Senate Judiciary Committee, October 3, 1962, *Congressional Record* (October 5, 1962) A7318, A7319.

As a Christian prayer, the Lord's Prayer would likewise be unacceptable as a form of worship to other non-Christian religions.

"Prayer is always worship." *People ex rel. Ring v. Board of Education*, 245 Ill. 334, 339 (1910); Prayer "is a solemn avowal of divine faith and supplication for the blessings of the Almighty," *Engel v. Vitale*, 370 U. S. 421, 424 (1962); it is the most fundamental expression of religious faith." Therefore, it is not surprising that the history of mankind is replete with conflicts over the forms and content of this religious ceremony. See *Engel v. Vitale*, *supra*, footnotes 5-8, at 426, 427.

In view of the foregoing, it is clear that an opening exercise in the public schools which includes the recitation by the students of the Lord's Prayer is a devotional exercise, an act of worship, a religious ceremony and, in addition, a characteristically Christian service.

5. Reform Judaism is one of the three major branches of the Jewish faith; the others are Conservative Judaism and Orthodox Judaism.

6. The Talmud, commenting on Deut. 10:13, described prayer "as the divine service of the heart." It is often regarded as superior to all sacrifices. "God loves prayer, especially that of the pious man; but it must be performed in the right spirit, not as a fixed task that has to be done, but as a fervent pouring out of the soul of the pious man which comes from the heart which is truly moved. The worshipper must feel that he is standing in holy awe before the majesty of God \* \* \* One should enter upon prayer in the spirit of deepest humility and holy reverence, and one should pray only when one has a longing to do so in one's own heart and is attuned to it by reason of a devotional mood." *84 Jewish Law: Encyclopedia* 618 [Talmudic references omitted].



## B. Reading of a chapter or ten verses of the Holy Bible

The Holy Bible is a designation used by Christians. Jews refer to their Book as Holy Scriptures. To Christians the Holy Bible is a book consisting of two parts called "Old Testament" and "New Testament." The source of the Old Testament is Jewish Holy Scriptures, which antedate the Christian era. The New Testament consists of books and epistles written by the apostles who put the teachings of the new Christian religion into written form.

The Holy Bible, as described above, is regarded by Christians as the Word of God. Moore, George Foot, *History of Religions*, Charles Scribner & Sons, New York (1947) Vol. II, 368, 371; *Columbia Encyclopedia* 197 (2nd ed., 1950); *Catholic Encyclopedia* 543 (1913 ed.); *Holy Bible*, Preface (Gideons' ed.); *People's ed., Ring v. Board of Education, supra*, at 343.

The first complete translation of the Holy Bible into English was made by John Wycliffe at the end of the Fourteenth Century. 3 *Encyclopedia Britannica* 531 (1959 ed.). Of numerous subsequent translations two are particularly significant for these cases: The King James, or Protestant version, and the Douay or authorized Roman Catholic version. These two versions differ not only as one might expect two different translations of the same text to vary, but also with respect to the parts or books which are included. For example, the two books of the Maccabees, the books of Judith, Tobias and Baruch are included in the Douay version but excluded from the King James version.<sup>7</sup>

7. These books are considered part of the Apocrypha. None of these books, although authored by Jews, is contained in the Jewish Scriptures. 1 *Universal Jewish Encyclopedia* 422. 2 *Encyclopedia Britannica* 105 (1959 ed.).

The name "Old Testament" is not used by Jews to describe their Holy Scriptures or any part thereof; that name was given to the Hebrew Scriptures by the Christians because they regarded the New Testament as the completion and perfection of the earlier Scriptures. The Jews do not accept any part of the New Testament as revelation. Nor do they accept the King James or the Douay versions of the Old Testament but use the Hebrew text of their Scriptures handed down by tradition (Mesoretic Text), or approved translations into English from the Mesoretic Text. 2 *Universal Jewish Encyclopedia* 280-282. As to the sectarian character of the Christian Holy Bible from the point of view of Jews, see *People ex rel. Ring v. Board of Education*, *supra*, at 347-8; *Herold v. Parish Board of School Directors*, 136 La. 1034, 1047 ff. (1915); *Tuttle v. Board of Education of Rutherford*, 14 N. J. 31, 46 (1953).

The differences between the Protestant and Catholic versions of the Lord's Prayer have already been noted.

Disputes concerning the Holy Bible during the 14th and 15th Centuries and at the time of the Reformation arose over the question of whether the Bible should be translated into the languages spoken by the people at that time. The remains of John Wycliffe, who translated the Bible from Latin into English, were ordered exhumed and burned. 23 *Encyclopedia Britannica* 821-4 (1959 ed.).

William Tyndale, who translated the Bible from Hebrew and Greek into the vernacular in the early 16th Century, was driven out of England during the reign of Henry VIII and hunted by the Inquisition until caught in 1536, tried for heresy and condemned. He was strangled and burned at the stake in Velyorde, Belgium. 22 *Encyclopedia Britannica* 642-3 (1959 ed.).

When it was finally accepted among Christians that the Bible should be taught to the people in their own language, controversy over the Bible continued, but the question now was over the correct version or translation. As mentioned above, in England the Protestants adopted the King James version, the Roman Catholics the Douay version. The Jews retained their Holy Scriptures in the Hebrew form that was transmitted from generation to generation and in various translations into the vernacular languages.<sup>8</sup>

Similar religious controversies over the Bible occurred in the history of our country. If one well-known case—Philadelphia in 1844—community conflict over which version of the Bible should be read in the public schools led to riots, church burnings and loss of life. Billington, Ray, Allen, *The Protestant Crusade, 1800-1860*, Macmillan Co., New York (1938) 220-234.

The earliest cases in the state courts challenging Bible-reading in the public schools were instituted by Roman Catholic parents who objected to the use of the King James version. *Donahoe v. Richards*, 38 Me. 379 (1854); *Board of Education of Cincinnati v. Minor*, 23 Ohio St. 211 (1872); *McCormick v. Bart*, 95 Ill. 263 (1880); *Moore v. Monroe*, 64 Iowa 367 (1884); *State ex rel. Weiss v. District Board*, 76 Wis. 177 (1890); *Pfeiffer v. Board of Education*, 118 Mich. 560 (1898); *Billard v. Board of Education*, 69 Kan. 53 (1904); *Hackitt v. Brooksville Graded School District*, 120 Ky. 608 (1905). See also Stokes, Anson Phelps, *Church and State in the United States*, Vol. II, 550, 566, Harper, New York (1950). In some later cases Jewish

8. The translation of the Jewish Holy Scriptures from the Hebrew into other languages, such as Aramaic, Greek, Arabic, Yiddish, German, English, etc., never presented a theological problem for Jews.

petitioners joined with Roman Catholics in challenging the use of the King James version of the Bible for opening exercises in the public schools. *People ex rel. Ring v. Board of Education, supra; Herold v. Parish Board of School Directors, supra; Doremus v. Board of Education, supra.*

A distinction must be drawn between reading selected portions of the Bible as part of a devotional or inspirational exercise at the beginning of the public school day and the use of the Bible in the context of instruction in such subjects as literature, art, history and social studies. The Bible has a monumental place as a classic in world literature. There can be no meaningful instruction in the development of the literature of Western Civilization without recognition of the Bible, as well as other classics, such as the Iliad and the Odyssey, Beowulf, the Edda, the Nibelungenlied and the Song of Roland. In addition, the Bible, even more so than the other classics, is indispensable for the understanding and appreciation of innumerable artistic and literary works. The Bible is probably the most frequently cited document.

The language of the Bible, now simple and direct in its homely vigour, now sonorous and stately in its richness, has placed its indelible stamp upon our best writers from Bacon to Lincoln and even to the present day. Without it there would be no Paradise Lost, no Samson Agonistes, no Pilgrim's Progress; no William Blake, or Whittier, or T. S. Eliot as we know them; no Emerson or Thoreau, no Negro Spirituals, no Address at Gettysburg. Without it the words of Burke and Washington, Patrick Henry and Winston Churchill would miss alike their eloquence and their meaning. Chase, Mary Ellen, *The Bible and the Common Reader*, Macmillan Company, New York (1945) 9.

Similarly, the Bible is a source book of history. Many of the events that occurred in the early civilizations in the Middle East, particularly in The Holy Land, are reflected in the Bible. In recent years, numerous archeological discoveries, including the Dead Sea Scrolls, have tended to verify the authenticity of many of the stories recorded in the Bible. Albright, William Foxwell, *Archaeology and the Religion of Israel*, Johns Hopkins Press, Baltimore (1946); Burrows, Millar, *The Dead Sea Scrolls*, Viking Press, New York (1955), 326 ff.; Gaster, Theodor H., *The Dead Sea Scriptures*, Doubleday, New York (1956) 12 ff.; Allegro, John M., *The Dead Sea Scrolls*, Penguin Books, Ltd., Harmondsworth, England (1959 ed.) ch. 4.

The cases at bar, however, do not involve the use of the Bible for literary, historical, art appreciation or other non-religious purposes. The petitioners in the courts below did not contest such use of the Bible in classroom instruction. They challenged the requirement of Bible-reading in the public schools for devotional and inspirational purposes on the ground that such use was religious and sectarian. In other words, they challenged the required use of the Bible in the public schools as a book of worship.

The religious character of the Bible-reading ceremony involved in these cases is apparent from an examination of the circumstances surrounding the exercise.

It is part of an "opening exercise" which has a very special status in the school regimen. Such exercises are conducted in the home room or in the school assembly prior to the beginning of the regular periods of instruction in the various subjects which compose the school curriculum. The opening exercise, if in the classroom, is presided over by the home room teacher or, if in the assembly, by the

principal or his deputy. Neither presiding official is necessarily a literature or history teacher qualified to teach the literary or historical aspects of the Bible. This makes it clear that the reading of a portion of the Holy Bible as part of the opening exercise is not instruction in literature or history.

The special status and significance of the use of the Bible in the opening exercise is evidenced by the fact that in one case a state statute and in the other a board of education regulation expressly specify the Holy Bible as the document to be used. No other literary or historical work is or may be used as part of the opening exercise; "secular subjects are not usually taught in opening exercises." *State ex rel. Finger v. Weedman*, 55 S. D. 343, 355 (1929).

In both cases the reading from the Holy Bible is required to be "without comment." The prohibition of comment is a recognition of the religiously sensitive character of the material used in the opening exercise. That requirement refutes the argument that the Bible is there being used for literary or historical instruction. Implicit in instruction in our public schools is the rôle of the teacher in analyzing, explaining, evaluating and commenting upon the material used in the classroom. We know of no precedent for a prohibition against comment by the teacher in connection with the use of literary or historical source materials when such materials are used for instructional purposes. *State ex rel. Finger v. Weedman*, *supra*, at 346, 357.

Another indication of the religious character of the Bible-reading exercise is the association of the practice in both cases with the recitation of the Lord's Prayer. Bible-reading and recitation of the Lord's Prayer have



often been combined as part of the opening exercise in public schools. See: *Billard v. Board of Education*, *supra*; *Hackett v. Brooksville Graded School District*, *supra*; *Church v. Bullock*, 104 Tex. 1 (1908); *People ex rel. Ring v. Board of Education*, *supra*; *Herold v. Parish Board of School Directors*, *supra*; *Doremus v. Board of Education*, *supra*; *Carden v. Bland*, 199 Tenn. 665 (1956); *Chamberlin v. Dade County Board of Public Instruction*, 142 So. 2d (Fla.) 21 (1962).

Both in Baltimore and in Pennsylvania provision is made for the excuse of any child whose parent or guardian objects to his participation in the opening exercise. That provision is meaningful only if the exercise is intended as a religious ceremony. It is significant that the original Pennsylvania statute, 24 P. S. Pa. Sec. 15-1516, had no provision for the excuse of an objecting child when the *Abington* case was instituted. It was only after the Federal District Court for the Eastern District of Pennsylvania had held the statute unconstitutional under the First Amendment, *Schempp v. School District of Abington Township*, 177 F. Supp. 398 (1959), that the Legislature sought to cure the constitutional defect by amending the statute to provide for the excuse of an objecting child. 24 P. S. Pa. Sec. 15-1516 (Supp. 1960). Similarly, the Baltimore school regulation was amended to provide expressly for the excuse of an objecting child in order to comply with an opinion rendered by the Attorney General of Maryland following a protest by the petitioners below. *Murray v. Curlett*, *supra*, at 242. That history of the current Pennsylvania statute and Baltimore school board regulation serves to strengthen the conclusion that the Bible-reading exercise is recognized as a religious ceremony which some

children may be expected to find objectionable on grounds of conscience.

The Baltimore regulation, in addition to permitting the excuse of objecting children, provides that "the Douay version [of the Holy Bible] may be used by those pupils who prefer it." Rules of the Board, Art. VI, Sec. 6. The obvious purpose of that provision is to accommodate those Roman Catholic children who have religious objections to participation in any religious ceremony involving the use of a version of the Holy Bible which lacks the imprimatur of their Church." The regulation fails, however, to make similar provision for those children who may not accept either the King-James or Douay version of the Holy Bible.

Those who sponsor Bible-reading and prayer in the public schools would be the first to acknowledge that the Holy Bible is selected for the opening exercises for the very purpose of bringing religious content into the daily program of the public schools and thereby helping to counteract what they characterize as the "Godless" atmosphere in the public schools. *State ex rel. Finger v. Weedman*, supra 352; Will, A. S. *Life of Cardinal Gibbons*, Dutton & Co., New York (1922), Vol. I, p. 478.

To summarize, daily reading from the Holy Bible as part of the opening exercise in the public schools is a religious and devotional ceremony. It is also a sectarian ceremony. It is sectarian as between Christians and non-Christians because the Holy Bible is a Christian document. It is also sectarian as between Roman Catholics and Protestants because each such religious group accepts different versions of the Bible as authorized.

9. It is difficult to comprehend how that provision solves the problem of one religious group's being exposed to the reading of a version of the Holy Bible unacceptable to it, unless the Protestant and Catholic children are physically separated in different classrooms during the opening exercise.

## POINT II

**Religious and sectarian practices in the public schools violate the constitutional prohibition against an establishment of religion.**

### **A. The establishment of religion clause of the First Amendment**

The First Amendment to the United States Constitution provides, in part, as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

This provision against action by Congress has been held equally applicable to action by the states or any of their political subdivisions. *Cantwell v. Connecticut*, 311 U. S. 296 (1940); *Murdock v. Pennsylvania*, 319 U. S. 106 (1943).

The minimum meaning of the Establishment Clause has been spelled out by this Court in *Everson v. Board of Education* 330 U. S. 1 (1947) as follows:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No

tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State." *Id.*, at 15-16.

The majority and minority in *Everson* agreed upon that definition. This Court noted such agreement in *McCullum v. Board of Education*, 333 U. S. 203, 210-211 (1948) and in *Torcaso v. Watkins*, 367 U. S. 488, 492-493 (1961). Whether or not that definition of the Establishment Clause was *obiter dictum* in *Everson*, it indisputably became the *ratio decidendi* in *McCullum*, as acknowledged by this Court's opinion in *Torcaso*. That definition of establishment was reaffirmed in the opinion of the Chief Justice in *McGowan v. Maryland*, 366 U. S. 420, 443 (1961), and by the unanimous opinion of this Court in *Torcaso*, *supra*, at 492-3.<sup>10</sup>

In *McCullum* this Court struck down as a violation of the Establishment Clause a program involving religious education in the public schools of Champaign, Illinois. Under that program, children attending public schools whose parents so requested were released for a thirty or forty-five minute period each week, during the regular school time, to receive religious instruction from sectarian teachers. Such classes were conducted in the regular classrooms of the public school buildings. Students whose parents did

10. Sixteen Justices of this Court since 1947 have subscribed to that definition of the Establishment Clause; not a single Justice since that date has challenged that definition.

not wish them to participate in the religious instruction were not required or permitted to remain in the classrooms where such instruction took place. Instead, they were assigned to other places in the public school buildings for the pursuit of their secular studies. *McCollum v. Board of Education, supra*, at 207-209.

This Court held that Champaign program unconstitutional under the Establishment Clause of the First Amendment. The Court concluded that "the foregoing facts" show the use of tax-supported property for religious instruction \* \* \* *Id.*, at 209. Such use of "tax-supported property" was a violation of the prohibition against laws "which aid one religion, aid all religions, or prefer one religion over another."

*Engel v. Vitale, supra*, is the other case in which this Court dealt with the constitutionality of religious practices in the public schools.

There a group of parents of children attending the public schools of New Hyde Park, New York, challenged the constitutionality of a board of education regulation requiring the daily recitation of a "non-denominational" prayer as part of the opening exercise. The prayer had been composed and recommended to the local school authorities by the Board of Regents which supervises the educational system of the state. When that case reached this Court, provision had been made by school-board regulation for the excuse of any child whose parent or guardian objected to his participation in the prayer.

This Court recognized that the Regents' prayer was "religious activity" \* \* \* a solemn avowal of divine faith and supplication for the blessings of the Almighty. *Engel v. Vitale, supra*, at 424. Hence this Court held that state or federal governments, under the Establishment Clause, ar-

"without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity." *Id.*, at 430.

After reviewing religious controversies in England and the United States over forms of prayer, Mr. Justice Black, in his opinion for the Court, said that the "Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate." *Id.*, at 431, 432. Therefore, all political subdivisions of our government, state or federal, were directed to "stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance." *Id.*, at 435.

This Court has on a number of occasions made it clear that separation between church and state as required by the Establishment Clause is not a manifestation of an anti-religious attitude on the part of our society. In *Engel* this Court said: "Nothing, of course, could be more wrong" than to argue "that to apply the Constitution in such a way as to prohibit state laws respecting an establishment of religious services in public schools is to indicate a hostility toward religion or toward prayer." *Engel v. Vitale*, *supra*, at 433, 434. In *Torcaso*, this Court cited Mr. Justice Frankfurter's concurring opinion in *McCollum*, where he said that "we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion." *Torcaso v. Watkins*, *supra*, at 494. See also *McCollum v. Board of Education*, *supra*, at 232; *Everson v. Board of Education*,



<sup>a</sup>  
*supra*, at 59 (dissenting opinion). The Court's opinion in *McCollum* said that "the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *McCollum v. Board of Education*, *supra*, at 212.<sup>11</sup>

**B. Bible-reading and the recitation of the Lord's Prayer in opening school exercises as an establishment of religion**

We have shown that Bible-reading and the recitation of the Lord's Prayer as part of the opening exercises in the public schools of Baltimore and Pennsylvania are religious devotional ceremonies. As such they are barred by *Engel*.

A comparison of the principal features of the ceremony involved in *Engel* with those involved in the instant cases establishes the striking similarity between the programs. The common features may be listed as follows:

11. This understanding of the Establishment Clause by the Court has been echoed in editorials in the general press. See: *Chicago Sun-Times*, June 27, 1962; *Hartford Courant*, June 28, 1962; *New York Times*, June 27, 1962; *New York Herald Tribune*, June 27, 1962; *St. Louis Post-Dispatch*, June 28, 1962; *Washington Post*, June 26, 1962; *Wilmington Morning News*, June 27, 1962; *Milwaukee Journal*, June 28, 1962; *Pittsburgh Post-Gazette*, June 27, 1962; *Louisville Courier-Journal*, June 27, 1962; *Christian Science Monitor*, June 27, 1962; *Salt Lake Tribune*, June 28, 1962; *Helena Independent Record*, June 29, 1962; *York (Pa.) Gazette and Daily*, July 2, 1962. See also editorials in religious publications: *The Christian Century*, July 18, 1962, p. 882, August 1, 1962, pp. 934-36; *Concern* (General Board of Christian Social Concerns of the Methodist Church), August 1, 1962, pp. 3-4; *Commonweal*, July 13, 1962, p. 387; *The Church World* (Roman Catholic Diocesan newspaper of Portland, Me.), July 7, 1962, editorial; *The Churchman*, August 1962, p. 4; *The Ethical Outlook*, Sept.-Oct. 1962, p. 149; *The Catholic Reporter* (Kansas City, Mo.), July 13, 1962, editorial. See also *Statement of Commission on Social Action of Reform Judaism*, *Congressional Record*, October 5, 1962, pp. A7318, A7319.

a. Required by statute or regulation promulgated by state authority.

b. Religious ceremony.

c. Part of the daily opening exercise in the public schools.

d. Prohibition against comment by school authorities.

e. Provision for the excuse of children who object on grounds of conscience.

In addition to these common features, the cases at bar involve religious practices which, as we have shown, are clearly sectarian. By reason of this sectarian feature, the practices involved in these cases run afoul, not only of *Engel*, but also of that express principle enunciated in *McCullum* that government may not "aid one religion . . . or prefer one religion over another." *McCullum v. Board of Education*, *supra*, at 210. To put it another way, when the state directed the use of a sectarian ceremony in the public schools, it abandoned that neutrality which this Court held must be maintained "when it comes to competition between sects." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). See also *Tudor v. Board of Education of Rutherford*, *supra*.

Conceding that the various standard versions and translations of the Old Testament contain passages which do not create doctrinal difficulties for Protestants, Catholics or Jews,<sup>12</sup> there is nothing in the Baltimore regulation or the

12. There are, however, passages in the Old Testament which, in translation, reflect doctrinal differences in the various texts, e.g., Isaiah 7, 14. The Hebrew word, **העלמה** (*ha-almah*), is translated in the English text of the Jewish Holy Scriptures (*Soncino Books of the Bible*; Soncino Press, London, 1949) as "the young

Pennsylvania statute which limits the teacher to selections from the Old Testament.<sup>13</sup> Hence, a teacher could select for daily reading passages from the New Testament which are clearly sectarian from the Jewish point of view.

To permit the teacher to select the part of the Bible to be read without test whereby to determine the selection is to allow any part, or all parts, to be selected. *Herold v. Parish Board of School Directors*, *supra*, at 1049.

Therefore, if the recitation of the Lord's Prayer is proscribed as a sectarian religious act, so long as reading selections from the Holy Bible is permitted and no limitation imposed upon the teacher concerning the choice of passages to be read, the teacher could conceivably select for daily reading the Lord's Prayer, which appears in two books of the New Testament.<sup>14</sup>

This Court recently reiterated the constitutional requirement of government neutrality in this field in *Toranzo v. Watkins*, *supra*, when it held unconstitutional a Mary-

woman" whereas in the King James version it appears as "a virgin" and is cross-indexed to those verses in the Gospel according to St. Matthew which describe the conception of Jesus by the Virgin. Matt. 1, 23. Thus, the verse "Thereupon the Lord himself shall give you a sign: Behold, a virgin shall conceive, and bear a son, and shall call his name Immanuel" is interpreted in the Christian Old Testament as foretelling the coming of Christ.

13. In this respect these cases differ from *Darceney v. Board of Education*, *supra*, where the New Jersey statute expressly limited the Bible-reading to selections from the Old Testament.

14. On the other hand, for the state, through its legislative, judicial or executive branch, to undertake to select which passages of the Holy Bible are non-sectarian and hence appropriate for use in the public schools, would thrust the state into the whirlpool of religious conflict and dispute, the very thing the Establishment Clause was intended to avoid.

land requirement that applicants for public office swear to a belief in God. The unanimous opinion in that case made it clear that government in this country could not aid or prefer "religions based on a belief in the existence of God as against religions founded on different beliefs" or as against "non-believers." *Id.*, at 495. Hence *Torcaso* is another authority against the constitutionality of religious practices in the public schools which tend to favor certain religions.

This Court's opinion in *Engel* made it clear that under the First Amendment's prohibition against governmental establishment of religion, "government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer . . ." *Engel v. Vitale*, *supra*, at 430.

When agencies of the states select and approve a specific prayer and a basic religious document and direct that they be used in a religious ceremony in the public schools, the states just as effectively "prescribe" and "sanction" the form of religious service as when they compose the text to be used in such ceremony, as the New York Board of Regents did in *Engel*. This conclusion finds unequivocal support in the language in this Court's opinion in *Engel*, where it stated that the business of government in this country does not include "writing or sanctioning" official prayers. *Id.*, at 435. Whether the state authority writes the prayer for use in the public schools, as it did in *Engel*, or selects portions of an existing religious document for use as part of the opening exercise, as it did in Baltimore and Pennsylvania, is constitutionally immaterial. In both instances the public authorities "prescribe" and "sanction" the religious documents which are to be used

in the opening exercise. In both instances we are faced with the establishment of a practice "as an officially approved religious doctrine." *Id.*, at 436.

Furthermore, it can hardly be denied that the public schools in both cases at bar are financing a religious exercise. The teacher or supervisor who leads the class or assembly in the opening exercise is on the public payroll and the time taken with the religious ceremony here in issue is certainly equal to if not in excess of the time taken to recite the 22-word prayer struck down in *Engel*. Thus, as in *Engel*, we have a use of tax funds, small as it may be, to support religious activities. *Pickerson v. Board of Education*, *supra*, at 16; *McCullum v. Board of Education*, *supra*, at 210; *Engel v. Vitale*, *supra*, Mr. Justice Douglas concurring, at 441.

Whatever the derivation of the religious ceremony, once it has been shown to be a religious activity carried on in the public schools under the sponsorship of public authorities, it is aid to religion and hence banned by the Establishment Clause. *McCullum v. Board of Education*, *supra*, at 210; *Torcaso v. Watkins*, *supra*, at 492-493.

Another constitutional objection to the ceremony here challenged is that the opening exercise of which it is a part and which is under the guidance and control of the public school teacher or principal, blends secular (Pledge of Allegiance) and religious (Bible-reading and the Lord's Prayer) programs, a combination condemned in *Zorach v. Clauson*, *supra* at 314.

### C. The impact of the Sunday Closing Law decisions

On May 29, 1961 this Court ruled on the constitutionality of several state statutes prohibiting certain business and labor activities on Sunday. The statutes were attacked as unconstitutional under the First and Fourteenth Amendments. One of the grounds urged upon this Court was that the acts were religious legislation and hence constituted an establishment of religion.

The Chief Justice, speaking for the Court in *McGowan v. Maryland*, *supra*, conceded that the Sunday closing laws were religious in their origin. He held, however, that they had lost their religious character, had become secular legislation, and therefore "presently they bear no relationship to establishment of religion as those words are used in the Constitution of the United States." *Id.* at 444. He added that Sunday legislation would violate the Establishment Clause if it could be "demonstrated that its purpose—evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect—is to use the State's coercive power to aid religion." *Id.* at 453.<sup>15</sup>

To meet the test spelled out by the Chief Justice in *McGowan*, it would be necessary to argue that the daily reading of the Holy Bible and recitation of the Lord's Prayer as part of the opening exercise in the public schools have neither a religious "purpose" nor a religious "effect"—a conclusion clearly irreconcilable with the fact that the Lord's Prayer is an invocation to the Supreme Being and the Holy Bible is regarded as the Word of God by those who sponsor its use in the public schools.

<sup>15</sup> See also *Gallagher v. Crown Kosher Super Market*, 366 U. S. 610, 630, and *Braunfeld v. Brown*, 366 U. S. 590, 607.



**D. The program is unconstitutional even though objecting children may be excused.**

This Court has recognized a distinction between the Establishment Clause and the Free Exercise Clause of the First Amendment. *Engel v. Vitale*, *supra*, at 430; *McGowan v. Maryland*, *supra*, at 430. This difference is particularly striking when we consider the constitutional effect of a provision in the statute or school-board regulation for the non-participation of objecting pupils. It may be argued that permission for non-participation makes a religious program unobjectionable from the point of view of the free exercise of religion. However, the presence or absence of compulsory attendance is irrelevant in any discussion of the constitutionality of a program under the Establishment Clause. *Engel v. Vitale*, *Idid.* This clause of the First Amendment prohibits any agency of the state from undertaking or sponsoring religious programs, and it is of no moment that all or some of the citizens participate in such programs. Clearly, the holding of a Mass or a "Youth for Christ" revival meeting in a public school during the regular day would violate the Establishment Clause even though all children who objected on religious grounds were permitted or even required to absent themselves.

One objection to including religious prayers and recitals in the opening school exercises, notwithstanding provision for non-participation, is the fact that "the power, prestige and financial support of government is placed behind a particular religious belief." *Engel v. Vitale*, *supra*, at 431. This has the effect of an "indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion." . . . *Idid.* See also, *McGowan v. Maryland*, *supra*, at 432; Mr. Justice Frankfurter's con-

curring opinion in *McCullum, supra*, at 230; and *Tudor v. Board of Education of Rutherford, supra*, at 51.

The non-participating children are inevitably set apart as non-conformists and subjected to social and psychological pressures to modify or repudiate the religious beliefs and conduct they are taught in their homes and religious institutions. The choices open to the non-participating child are both bad: he may ask to be excused and hence label himself as a non-conformist to his peers; he may yield to the pressure and participate in the exercise although it conflicts with his beliefs.

It is a well known fact that young children of public school age are peculiarly susceptible to the coercion implicit in the teacher's role as the director and supervisor of the opening exercise. *McCullum v. Board of Education, supra*, Mr. Justice Frankfurter concurring, at 227. It would be a rare child, indeed, who would have the courage to question the propriety of the religious content of the opening exercise.

The dilemma in which the child is thus placed is not of his own creation; it is created for him by the state authorities who elect to include a religious exercise in the public school program. To consider the "obvious pressure" thus exerted upon public school children as beyond the Court's cognizance, is "to draw a thread from a fabric." It fails to accept the fact that the public school authorities, by deliberately introducing a religious exercise, are responsible for imposing the dilemma upon children who have been committed to their care solely for secular education. *Ibid.*

Several state courts, when called upon to consider various religious practices in the public schools, like this Court

have held that provision for non-participation did not save a school-sponsored religious program from invalidity under state constitutional provisions which had the same objective as the First Amendment. *People ex rel. Ring v. Board of Education*, *supra*, at 351; *State ex rel. Weiss v. District Board*, *supra*, at 219, 220; *Herold v. Parish Board of School Directors*, *supra*, at 1049-1050.

As was mentioned earlier in this brief, the Baltimore regulation and the Pennsylvania statute here in question originally did not provide for the excuse of an objecting child and were amended expressly to make such provision only after the petitioners below challenged the exercises. In *Engel v. Vitale* also, the original board of education regulation neglected to provide for such excuse and was later amended at the direction of the trial court to include the excuse provision. *Engel v. Vitale*, 18 Misc. 2d 659, 694 (1959). Just as the amendment failed to save the regulation under the Establishment Clause in *Engel*, so do the amendments fail to save the regulation and statute in the instant cases.

**E. Various religious practices not involving public schools are not legal precedents for these cases.**

The Court of Appeals of Maryland, in its majority opinion below, referred to opening prayers at state and federal legislative sessions in public meetings and conventions and to the invocation of God at court openings to buttress its conclusion that the First Amendment does not exclude prayer and Bible-reading from opening exercises in public schools. *Murray v. Curlett*, *supra*, at 247.

It should be noted that none of the traditional practices cited by the Maryland Court of Appeals relates to the area

of public school education which involves young and impressionable children. It cannot be argued, for example, that the employment of chaplains by the Congress is authority for the employment of chaplains by the public schools. Furthermore, none of the practices cited by the Maryland Court of Appeals has been subjected to authoritative judicial scrutiny. See *Massachusetts v. Mellon*, 262 U. S. 447 (1923).

In *Engel v. Vitale*, this Court dealt with the same argument made to defend the constitutionality of the Regents' Prayer which was required to be recited in the public schools of New Hyde Park. The Court distinguished such "manifestations in our public life of belief in God" from religious practices mandated by public school authorities. It said: "Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance." *Engel v. Vitale*, *supra*, at 435, note 21.

#### **F. State court decisions upholding Bible-reading or recitation of the Lord's Prayer in public schools**

Elsewhere in this brief we have referred to a number of decisions of the highest courts of the states which held Bible-reading in the public schools, with or without the recitation of the Lord's Prayer, to be unconstitutional. *State ex rel. Weiss v. District Board*, *supra*; *People ex rel. Ring v. Board of Education*, *supra*; *Herold v. Parish Board of School Directors*, *supra*; *State ex rel. Finger v. Weedman*, *supra*. We are aware, however, that other state courts dealing with the same question have held otherwise, and the prevailing opinion of the Maryland Court of Appeals in *Murray v. Curlett* relied on such decisions. *Id.*, at

249. The overwhelming majority of those cases was decided on the basis of the state constitutional provisions guaranteeing freedom of religion.<sup>16</sup> They were also decided before this Court had firmly established that the First Amendment's Establishment Clause was binding upon the states through the Fourteenth Amendment.

Nonetheless, since the bills of rights of many state constitutions are modelled after the Federal Bill of Rights, an examination of the reasoning used in the state court decisions is in order.

The decisions upholding the constitutionality of Bible reading and recitation of the Lord's Prayer in the public schools are based on dubious grounds which may be listed as follows:

1. The Bible is an essential source of literary and historical knowledge and hence may not be excluded from the public schools. *People ex rel. Vollmay v. Stanley*, 81 Colo. 276, 289, 290 (1927); *Kaplan v. School District*, 171 Minn. 142, 150, 151 (1927); *Donahoe v. Richards*, *supra*, at 399; *Lewis v. Board of Education*, 157 Misc. (N. Y.) 520, 530 (1935) appeal dismissed 276 N. Y. 490 (1937).

The use of the Bible in the public schools for literary or historical instruction is not questioned in the cases at bar. Reading, without comment of a chapter or ten verses of the Bible, with or without the recitation of the Lord's Prayer, as part of the opening exercise, is not instruction

16. But see *Doremus v. Board of Education*, *supra*, and *Cardon v. Bland*, *supra*. See also *Chamberlin v. Dade County Board of Public Instruction*, *supra*, where the Supreme Court of Florida expressly refused to accept this Court's interpretation of the Establishment Clause.

in literature or history; it is a religious rite mandated by state authorities and hence prohibited by the Establishment Clause.

2. The mere reading of short sections of the Bible and the recitation of the Lord's Prayer, without response, comment or remark, is not objectionable because there is no effort on the part of the teacher to inculcate religious dogma. *Billard v. Board of Education, supra*, at 58; *Wilkinson v. City of Rome*, 152 Ga. 763, 77- 774 (1921).

The religious nature of the exercise is determined by its form and content; whether the words are actually uttered by the teacher or the student is immaterial. Furthermore, this reasoning ignores the special role of the teacher. The mere reading of religious passages and prayers by the person to whom the pupils have been taught to look as authority, in the atmosphere of reverence which the public schools seek to achieve during the opening exercise, is tantamount to religious instruction or indoctrination.

3. A brief period of reverence or a simple act of spiritual devotion is not "worship." *Carden v. Bland, supra*, at 674.

The Establishment Clause prohibits state-sponsored religious exercises in public schools whether they are long or short. The use of the Holy Bible or of the Lord's Prayer in such exercises establishes their religious nature. A similar argument based on the brevity of the Regents' prayer, was rejected in *Engel v. Vitale, supra*, at 436.

4. Prayers are traditional in public functions, such as legislative sessions, court invocations and public meetings.



*Carden v. Bland*, *supra*, at 681; *Church v. Bullock*, *supra*, at 7; *Doremus v. Board of Education*, *supra*, at 442.

We have dealt with this argument in this brief at pp. 35-36, *supra*.

5. Bible-reading and recitation of the Lord's Prayer in the public schools are not sectarian practices; the term "sectarian" is limited to differences among "the various sects of Christianity." *People ex rel. Vollmar v. Stanley*, *supra*, at 288; *Hackett v. Brooksville Graded School District*, *supra*, at 617; *Doremus v. Board of Education*, *supra*, at 448; *Lewis v. Board of Education*, *supra*, at 530.

This definition of "sectarianism" is meaningless in terms of constitutional law. Implicit in it is the assumption that Christianity is established in the United States and that if a practice is acceptable to Christians it is constitutional. The argument also ignores the fact that Protestants and Roman Catholics accept different versions of the Holy Bible and the Lord's Prayer as well as the fact that Jews do not accept the Christian Holy Bible or the Lord's Prayer. In addition, it ignores the existence of other, non-Christian religions and of non-theistic religions. It treats as non-existent that substantial segment of the population that regards itself as religiously unaffiliated. See *Torcaso v. Watkins*, *supra*.

In any event, the criterion which a public school practice must satisfy to survive a constitutional challenge under the Establishment Clause is not merely the absence of sectarianism or denominationalism, but the absence of anything which makes the practice a "governmentally sponsored religious activity." *Engel v. Vitale*, *supra*, at 420.

6. The practice of reading from the Holy Bible and reciting the Lord's Prayer in the public schools reflects the religious commitment of the majority of our people which the minority religious groups must accept. *Donahoe v. Richards*, *supra*, at 409; *Pfeiffer v. Board of Education*, *supra*, at 566; *Church v. Bullock*, *supra*, at 8; *Wilkinson v. City of Rome*, *supra*, at 780, 781; *Doremus v. Board of Education*, *supra*, at 448.

The Constitution makes no distinction between religious minorities and majorities. In fact, the Bill of Rights protects rights of the individual against the state, not the rights of minorities against majorities or *vice versa*. The Establishments Clause which prohibits "laws which aid one religion, aid all religions, or prefer one religion over another," does not differentiate between majority and minority religions. *McCullum v. Board of Education*, *supra*, at 210; *Torcaso v. Watkins*, *supra*, at 493.

The majority-minority argument assumes that a large number of adherents can give a preferred status to one religion over another and that instrumentalities of the state may take cognizance of the numerical strength of different religious groups. This is an untenable doctrine which has been rejected time and again by this Court. *Nichols v. Maryland*, 340 U. S. 268, 272, 273 (1951); *Fowler v. Rhode Island*, 345 U. S. 67, 69, 70 (1953); see also *Torcaso v. Watkins*, *supra*.

7. No one's freedom of religion is or can be violated so long as an objecting child upon request is excused from participating in the ceremony. *Moore v. Monroe*, *supra*, at 370; *Doremus v. Board of Education*, *supra*, at 454; *People ex rel. Vollmar v. Standen*, *supra* at 293; *Hackett v. Brooks*.

*ville Graded School, supra*, at 615; *Kaplan v. Independent School District, supra*, at 151; *Pfeiffer v. Board of Education, supra*, at 563.

We have dealt with this argument in this brief at pp. 33-35, *supra*.<sup>1</sup> The fact that a child may, upon request, be excused from the observance of a religious rite in the public schools cannot serve to free it from the limitations of the Establishment Clause. *Engel v. Vitale, supra*, at 430.

8. Bible-reading and recitation of the Lord's Prayer as part of opening exercises have been traditional in the public schools. *Pfeiffer v. Board of Education, supra*, at 566; *Doremus v. Board of Education, supra*, at 452.

This contention can no more justify practices which are in violation of the First Amendment than the tradition of racial segregation in the South could save those practices from attack under the Equal Protection Clause of the Fourteenth Amendment. *Brown v. Board of Education*, 347 U.S. 483 (1954).

### Conclusion

Reading from the Holy Bible and the recitation of the Lord's Prayer, or either practice, required by the state as part of the opening exercise in the public schools, is an establishment of religion in violation of the First Amendment as made applicable to the states by the Fourteenth Amendment. The decision of the United States District Court for the Eastern District of Pennsylvania in *School District of Abington Township v. Schempp*, declaring such requirement unconstitutional, should be affirmed, and the

decision of the Court of Appeals of Maryland in *Murray v. Curlett*, upholding such requirement, should be reversed.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**

**October Term, 1962**

**No. 142**

SCHOOL DISTRICT OF ABINGTON TOWNSHIP, PENN-  
SYLVANIA, JAMES F. KOEHLER, O. H. ENGLISH,  
EUGENE STULL, M. EDWARD NORTHAM, and  
CHARLES H. BOEHM, Superintendent of Public Instruction,  
Commonwealth of Pennsylvania,

**Appellants**

v.  
EDWARD LEWIS SCHEMPP, SIDNEY GERBER  
SCHEMPP, Individually and as Parents and Natural  
Guardians of ROGER WADE SCHEMPP and DONNA  
KAY SCHEMPP.

**Appellees**

**BRIEF FOR APPELLANTS**

*On Appeal from a District Court of Three Judges  
for the Eastern District of Pennsylvania*

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January 4, 1963.

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IN THE  
SUPREME COURT OF THE UNITED STATES

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October Term, 1962

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No. 142

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School District of Abington Township, Pennsylvania,  
James F. Koehler, O. H. English, Eugene Stull, M. Edward  
Northam, and Charles H. Boehm, Superintendent of Public  
Instruction, Commonwealth of Pennsylvania,

*Appellants*

v.

Edward Lewis Schempp, Sidney Gerber Schempp, Individ-  
ually and as Parents and Natural Guardians of Roger  
Wade Schempp and Donna Kay Schempp,

*Appellees*

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*On Appeal From a District Court of Three Judges for the  
Eastern District of Pennsylvania.*

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**BRIEF FOR APPELLANTS**

**OPINIONS BELOW**

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The opinion with findings of fact and conclusions of law of the three-judge District Court for the Eastern District of Pennsylvania declaring the former Bible reading statute unconstitutional is reported in 177 F. Supp. 398 (R. 177). The opinion of such court permitting appellees to file their supplemental pleading is reported in 195 F. Supp. 518 (R. 201). The subsequent opinion of such court, with findings of fact and conclusions of law, declaring the amended Bible reading statute unconstitutional, is reported in 201 F. Supp. 815 (R. 228).

## **JURISDICTION**

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The final decree of the three-judge District Court for the Eastern District of Pennsylvania was entered on February 1, 1962 (R. 236). Notice of appeal was filed in that court on March 28, 1962 (R. 237). The jurisdictional statement was filed May 24, 1962 and probable jurisdiction was noted October 8, 1962 (R. 241).

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1253.



## *Statutes Involved*

### STATUTES INVOLVED

The statute of Pennsylvania previously declared unconstitutional by the three-judge court, as it read at the time appellees' original complaint was filed and the final decree of September 7, 1959 issued, was as follows:

"Section 1516. Bible To Be Read in Public Schools.—At least ten verses from the Holy Bible shall be read, or caused to be read, without comment, at the opening of each public school on each school day, by the teacher in charge: Provided, That where any teacher has other teachers under and subject to direction, then the teacher exercising such authority shall read the Holy Bible, or cause it to be read, as herein directed.

If any school teacher, whose duty it shall be to read the Holy Bible, or cause it to be read, shall fail or omit so to do, said school teacher shall, upon charges preferred for such failure or omission, and proof of the same, before the board of school directors of the school district, be discharged."

Section 1516 of the Public School Code of 1949, the Act of March 10, 1949, P.L. 30, as amended May 9, 1949, P.L. 939, 24 Purdon's Pa. Stats. Ann. Section 15-1516

The amended statute of Pennsylvania that was declared unconstitutional by the three-judge court in its opinion and decree dated February 1, 1962, is as follows:

"Section 1516. Bible Reading in Public Schools.— At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian."

Section 1516 of the Public School Code of 1949, the Act of March 10, 1949, P.L. 30, as amended December 17, 1959, P.L. 1928, 24 Purdon's Pa. Stats. Ann. Section 15-1516.

The First Amendment of the Constitution of the United States provides as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment, Section 1, provides as follows:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## QUESTIONS PRESENTED

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1. Is Pennsylvania's Bible reading statute, Section 1516 of the Public School Code of 1949, the Act of March 10, 1949, P.L. 30, as amended by the Act of December 17, 1959, P.L. 1928, a law respecting an establishment of religion or prohibiting the free exercise thereof within the prohibition of the First Amendment to the United States Constitution as applied to the States by the Fourteenth Amendment, by providing for the reading without comment at the opening of each public school on each school day, of at least ten verses from the Holy Bible, subject to the excuse of any child from attending such Bible reading upon the written request of his parent or guardian?

2. Have appellees been deprived of any constitutionally protected right when, in the absence of compulsion on them to believe, disbelieve, participate in or attend a Bible reading exercise in violation of their religious consciences, they have not sought to be excused under a statute which provides the right of excuse, and no measurable tax burden upon them resulting from the Bible reading exercise has been shown?

## STATEMENT OF THE CASE

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On February 14, 1958, appellees, students in the public schools of Abington Township, Pennsylvania, and their parents, filed their complaint (R. 1) alleging that appellant School District of Abington Township and certain employees thereof were violating the religious consciences and liberties of appellees by causing the Bible to be read in the classrooms of the Abington Township School District pursuant to the then existing Section 1516 of the Public School Code of 1949, the Act of March 10, 1949, P.L. 30, as amended May 9, 1949, P.L. 939, which read as follows:

“Section 1516. Bible To Be Read in Public Schools.—At least ten verses from the Holy Bible shall be read, or caused to be read, without comment, at the opening of each public school on each school day, by the teacher in charge: Provided, That where any teacher has other teachers under and subject to direction, then the teacher exercising such authority shall read the Holy Bible, or cause it to be read, as herein directed.

If any school teacher, whose duty it shall be to read the Holy Bible, or cause it to be read, shall fail or omit so to do, said school teacher shall, upon charges preferred for such failure or omission, and proof of the same, before the board of school directors of the school district, be discharged.”

As the complaint prayed that appellants be enjoined from enforcing this statute, jurisdiction was assumed by

*Statement of the Case*

a three-judge court, pursuant to 28 U.S.C. Sections 2281 and 2284, as an action seeking a permanent injunction restraining the enforcement, operation and execution of a State statute.

After trial, the three-judge court, on September 16, 1959, issued its opinion declaring unconstitutional such Bible reading statute and the practice thereunder, on the grounds that it provided for an establishment of religion and interfered with appellees' free exercise of religion (R. 177). The conclusion of the court below was predicated on its factual finding that attendance by all pupils and participation by the teachers were compulsory. In its Eighth Finding of Fact (R. 194), the three-judge court stated:

"(8) The attendance of all students in both of the aforesaid schools at the ceremony of the Bible reading and recitation of the Lord's Prayer is compulsory."

On the same day, the three-judge court issued its final decree which perpetually enjoined appellants from causing to be read to the students in the public schools of Abington Township the Holy Bible as directed by the Pennsylvania Public School Code, or as part of any ceremony, observance, exercise or school routine (R. 196).

On September 21, 1959, the three-judge court issued its order staying the operation and enforcement of the final decree until final determination of an appeal, and on November 12, 1959, notice of appeal to the Supreme Court of the United States was filed by appellants.

On December 17, 1959 the Legislature of Pennsylvania, to eliminate the compulsory features of the then existing statute amended Section 1516 of the Public School Code to read as follows:

"Section 1516.—Bible Reading in Public Schools.—  
At least ten verses from the Holy Bible shall be read,  
without comment, at the opening of each public school  
on each school day.

Any child shall be excused from such Bible reading,  
or attending such Bible reading, upon the written  
request of his parent or guardian."

This amended statute differs from the old statute in  
that the amendment deletes any provision requiring teachers,  
on pain of discharge, to cause the Bible to be read,  
and contains the entirely new provision for excusing any  
child from Bible reading or from attendance at the Bible  
reading on the written request of his parent or guardian.  
Following the passage of this amendment, the Abington  
Township School District altered its practice and now will  
excuse any child from attendance at Bible reading upon  
the written request of his parent or guardian (R. 205, par.  
10).

On December 23, 1959, appellants filed with the three-  
judge court their Motion for Relief from Judgment and  
Final Decree under Rule 60(b) of the Federal Rules of  
Civil Procedure. Such motion prayed that the final decree  
be vacated on the grounds, *inter alia*, that the passage of  
the amendment and the changes it brought about in the  
Bible reading practice in the Abington Township School  
District had eliminated any controversy between the parties  
and had rendered the issues moot.

On June 9, 1960, the three-judge court denied appellants'  
Motion for Relief from Judgment and Final Decree on the  
ground that it lacked jurisdiction either to entertain or  
adjudicate the motion and held that jurisdiction had



*Statement of the Case*

passed to and was lodged exclusively with the Supreme Court of the United States.

On August 5, 1960, appellants filed their Jurisdictional Statement and on October 24, 1960, this Court issued its *per curiam* order, which read as follows:

"The judgment is vacated and the case is remanded to the District Court for such further proceedings as may be appropriate in light of Act No. 700 of the Laws of the General Assembly of the Commonwealth of Pennsylvania, passed at the Session of 1959 and approved by the Governor of the Commonwealth on December 17, 1959." (364 U.S. 298.)

On January 5, 1961, because of the deep concern of the Commonwealth of Pennsylvania in its amended Bible reading statute, the Superintendent of Public Instruction petitioned the three-judge court and subsequently was permitted to intervene in this case as a party defendant (R. 200).

On January 4, 1961, appellees filed their motion for leave to file a supplemental pleading (R. 199), and, after filing of briefs and oral argument, the three-judge court, on June 22, 1961, filed its Opinion and Order granting leave to appellees to file such supplemental pleading (R. 201). Appellants filed their Answer to this supplemental pleading on July 10, 1961 (R. 204), and on October 17, 1961, trial was held before the three-judge court.

At this second trial appellees called Edward Schempp and his son, Roger, and rested their case on the brief testimony given by these two (R. 211-221) and on the evidence that had been previously introduced at the former trial under the old non-excusatory Act (R. 221-225).

On February 1, 1962, the three-judge court issued its opinion declaring the amended statute unconstitutional on the ground that it violates the "establishment of religion" clause of the First Amendment made applicable to the Commonwealth of Pennsylvania by the Fourteenth Amendment (R. 228). The court held that the reading without comment of ten verses of the Holy Bible each morning, at an exercise from which any or all students could be excused, constituted an obligatory religious observance (R. 232).

On the same day, the three-judge court issued its final decree which perpetually enjoined appellants from reading and causing to be read or permitting anyone subject to their control and direction to read to students in the Abington Township Senior High School, any work or book known as the Holy Bible as directed by Section 1516 of the Public School Code of 1949, the Act of March 10, 1949, P.L. 30, as amended December 17, 1959, P.L. 1928, in conjunction with, or ~~not in~~ conjunction with, the saying, the reciting, or the reading of the Lord's Prayer (R. 236). Thereafter, on February 5, 1962, the three-judge court issued its Order staying the operation and enforcement of the final decree until final disposition of the case by this Court.

## SUMMARY OF ARGUMENT

The activity found by the court below to have violated the First Amendment to the Constitution of the United States was the practice of reading without comment ten verses of the Holy Bible at the opening exercises of the Abington Township High School pursuant to the Public School Code of Pennsylvania. It did not involve coercion of the pupils, any of whom were privileged to be excused upon the written request of their parents. It did not affect the appellees as taxpayers, or in any manner impair their right to exercise freely their religious beliefs.

The holding of the court below that this practice of Bible reading in Pennsylvania's public schools constitutes an unconstitutional "establishment of religion" in violation of the First Amendment is erroneous as a matter of law. The statutory Bible reading practice is not a religious practice. It requires only that those who wish to do so may listen to daily readings without discussion or comment from a great work that possesses many values, including religious, moral, literary and historical. Unlike the program of religious education struck down in *McCullum v. Board of Education*, 333 U.S. 203 (1948), the Pennsylvania practice does not involve proselytizing, persuasion, or religious indoctrination. It involves no avowal of faith, acceptance of doctrine, or statement of belief. Listening to the Bible being read, unlike the religious oath of office in *Torcaso v. Watkins*, 367 U.S. 488 (1961), and the solemn avowal of prayer in *Engel v. Vitale*, 370 U.S. 421 (1962), is not a religious act.

This Court has affirmed that we are a religious people, and that many of our customs compel the conclusion that our public life contains a religious leaven (*Zorach v. Clauson*, 343 U.S. 306 (1952)). Nothing in the Constitution requires that the courts or the government should be hostile to religion. In *Zorach* and *Engel* this Court has stated that the First Amendment requires only that the government be neutral, not friendly or hostile, to religion. The maintenance of such neutrality in the matter of religion in a nation that has this traditional religious leaven in its public life requires that the government neither add to nor subtract from such leaven. The appellants here contend that this Court is not required, under the First Amendment, to eradicate from this nation's public life all voluntary customs and established traditions which some might consider to have religious connotations. It is contended that the Legislature of Pennsylvania cannot be forced by a few persons to abandon a voluntarily attended Bible reading practice which has been traditional in Pennsylvania for generations, on the ground that such reading provides for "an establishment of religion," as held by the court below.

A decision by this Court that the Pennsylvania Bible reading practice is unconstitutional would provide a precedent whereby there could be eliminated from the public life of this nation all those customs and traditions that evidence the religious nature and origin of our country and are now and have long been cherished and accepted by a vast majority of the people. A decision by this Court upholding the constitutionality of the Pennsylvania Bible reading practice would be consistent with its prior holdings. It would reaffirm the constitutional requirement of neutrality to religion, for just as this Court refused to

allow the introduction of religious instruction into the public schools in the *McCollum* case or the creation of an official prayer for public school children in the *Engel* case, so did it permit to continue in public life the voluntary religious oath of office in the *Torcaso* case.

There is a complete absence of proof that the Pennsylvania Bible reading practice affects the appellees as taxpayers or interferes with their right to exercise freely their religion or their religious beliefs. Under the doctrine of *Doremus v. Board of Education*, 342 U.S. 429 (1952), such a failure of proof would have compelled the conclusion that appellees had no standing to maintain this action. Although it is recognized that the decision in *Engel v. Vitale*, 370 U.S. 421 (1962), indicates that this Court may have revised its previous holdings concerning the doctrine of "standing in court," it is contended that by reason of the total failure of appellees to establish any compulsion against them or pecuniary loss, this Court should conclude that appellees have not established standing sufficient to invoke the jurisdiction of this Court.

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**ARGUMENT**

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**POINT I****APPELLEES HAVE BEEN UNABLE TO SHOW  
THAT THE BIBLE READING PRACTICE INTER-  
FERES WITH THE FREE EXERCISE OF THEIR  
RELIGIOUS BELIEFS**

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**A. The Traditional Practice of Bible Reading  
in Pennsylvania**

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The practice of reading the Bible at the opening of each school day is a traditional custom that has existed in Pennsylvania since the early times and has been codified since 1913.<sup>1</sup> The practice has always been conducted in a secular manner, devoid of any attempt at proselytizing or the inculcation of religious belief.

The exact origin of Bible reading in Pennsylvania cannot be determined precisely because the custom originated before the practice of maintaining school records developed. That the Bible reading custom existed in the earliest schools may today only be demonstrated inferentially. The various reports of County Superintendents of

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<sup>1</sup> The Act of May 20, 1913, P.L. 226. The preamble to this Act stated in part that "it is in the interest of good moral training, of a life of honorable thought and of good citizenship, that the public school children should have lessons of morality brought to their attention during their school days."



Schools contained in *Report of the Superintendent of Common Schools of the Commonwealth of Pennsylvania for the year ending June 4, 1866* (Harrisburg 1867), indicate that the custom had been a long established one as early as 1866. That the Bible reading custom was shared by other states is evidenced by the *Annual Report to the Massachusetts Board of Education* submitted by Horace Mann in 1847, in which he stated:

"The use of the Bible in the schools is not expressly enjoined by law, but both its letter and its spirit are consonant with that use, and, as a matter of fact, *I suppose there is not, at the present time, a single town in the commonwealth in whose schools it is not read.*" (Emphasis supplied)<sup>2</sup>

Further light on the history of this practice in Pennsylvania is furnished by the opinion of Judge Edwards of the Court of Common Pleas of Lackawanna County in *Stevenson v. Hannon*, 7 Pa. Dist. Rep. 585 (1898), at page 588:

"... It is worthy of comment and reflects creditably upon the good sense of the people of Pennsylvania, that, although our common school system has been in existence for many years, and that, as a general rule, in a large number of school districts throughout the State, portions of the holy scriptures have been read as a part of the daily opening exercises, nobody up to this time has taken such interest in the question as to secure a decision upon it from our court of last resort..."

Although the Supreme Court of Pennsylvania has never had before it a case involving the practice of reading

<sup>2</sup> FULLER, HORACE MANN ANNUAL REPORTS, 595 (1868).

selections from the Bible in the public schools, such practice was held constitutional in several decisions of the Courts of Common Pleas:

*Hart v. School District*, 2 Chester County Reports 521 (1895);

*Curran v. White*, 22 Pa. County Reports 201 (1898);

*Stevenson v. Hannon*, *supra*.

While the question of Bible reading was being settled by the courts of Pennsylvania, the then Superintendent of Public Instruction, Dr. Nathan C. Schaeffer, edited a book of Bible readings for schools and stated in the Preface as follows:

“ . . . Bible readings cannot be omitted from the exercises of the school without the gravest loss and the most serious consequences.

It is, of course, not the mission of the public school to teach the creed or the doctrines of any religious denomination. That is the province of the home, the church, and the Sabbath School. In making this collection of Bible readings, the aim has been to bring together selections that appeal strongly to the moral nature of the child. In modern education it has become proverbial to say that the perpetuity and prosperity of the state depend upon the intelligence and virtue of the people. . . .”<sup>3</sup>

The first statutory enactment covering Bible reading in Pennsylvania was the Act of May 20, 1913, P.L. 226. The intent of the Act was stated in its preamble which read as follows:

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<sup>3</sup> AMERICAN BOOK COMPANY, BIBLE READINGS FOR SCHOOLS (1897).

"Whereas, The rules and regulations governing the reading of the Holy Bible in the public schools of this Commonwealth are not uniform; and

"Whereas, It is in the interest of good moral training, of a life of honorable thought and of good citizenship, that the public school children should have lessons of morality brought to their attention during their school-days . . . ."

The practice of Bible reading developed as an aid to moral training, and not for the purpose of introducing religion or sectarian instruction into public education. The people of Pennsylvania, speaking through their Constitution and Legislature, have long followed the policy of avoiding religion or sectarianism in their public schools.\*

\* Article I, Section 3 of the Pennsylvania Constitution of 1874 provides:

"All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience and no preference shall ever be given by law to any religious establishments or modes of worship."

Article X, Section 2 of the same Constitution, provides:

"No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school."

Section 108 of the Public School Code of 1949, the Act of March 10, 1949, P.L. 30, 24—Purdon's Penna. Stat. Ann., Section 1-108, provides:

"No religious or political test or qualification shall be required of any director, visitor, superintendent, teacher, or other officer, appointee, or employee in the public schools of this Commonwealth."

This same provision was included as Section 2801 of the Pennsylvania School Code of May 18, 1911, P.L. 309.

## **B. The Bible Reading Practice in Abington Township School District**

Since the passage of the 1913 Act the Bible reading practice has been continuously prescribed by statute in the Commonwealth of Pennsylvania. The present Superintendent of Public Instruction of Pennsylvania, Dr. Charles H. Boehm, considers that the practice has both educational and moral value for the students (R. 89-90).

At the Abington Senior High School the practice is conducted as follows: Between 8:15 and 8:30 of each school morning, while the students are in their Home Rooms or Advisory Sections; there is heard over the public address system a morning program which includes the reading of ten verses of the Bible without comment, the saying of the Lord's Prayer, the flag salute, and the school announcements for that particular day (R. 102-103, 108-109). The persons who conduct this opening exercise over the public address system are students of the radio and television course, which is part of the teaching program of the school (R. 109). Participation in this course is voluntary with

Section 1112(a) of the Public School Code of 1949, the Act of March 10, 1949, P.L. 30, 24 Purdon's Penna. Stat. Ann. Section 11-1112(a), further provides:

"That no teacher in any public school shall wear in said school or while engaged in the performance of his duty as such teacher any dress, mark, emblem, or insignia indicating the fact that such teacher is a member or adherent of any religious order, sect or denomination."

This provision, in substantially the same language had appeared as Section 1 in the Act of June 27, 1895, P.L. 395. This Section 1 was preceded by the following preamble:

"Whereas, It is important that all appearances of sectarianism should be avoided in the administration of the public schools of this Commonwealth."

the student (R. 131). The student who reads the verses from the Bible may use any version of the Bible. The King James version, the Catholic Douay version, the Jewish Holy Scriptures and the Revised Standard version have been so used (R. 109-112). The particular verses to be read are selected by the student who does the reading (R. 103-104, 113).

With regard to the actual reading of the Bible, there are no prefatory statements made, no questions are solicited, no comments or explanations are made before, during or after its reading. No instruction is contemplated; no interpretation is given. As the statute specifically provides that the reading be "without comment" the ten verses are simply read to those students who have elected to participate. They may listen, they may accept, reject, believe or disbelieve any part or all of what they hear. No participatory act is required and what significance the student draws from this practice is completely a matter of his own choice, as there is and can be no promotion, dissuasion or persuasion, and in addition, the student knows that neither he nor any of his classmates need be present during the Bible reading.

Although the practice of Bible reading has been followed for many years in the Commonwealth, there is no evidence that, with the exception of the present appellees, there ever has been a complaint concerning such practice lodged by any student or parent, and the Superintendent of Public Instruction of Pennsylvania, the Superintendent of Schools of Abington Township, and the Principal of the Abington Senior High School have testified that in all their long experience they have received no such complaint (R. 89, 125, 104). Nor has any evidence been introduced that would indicate that the superintendent, administra-

tors, teachers, students, parents, or anyone else, coerced, or attempted to coerce, any child to attend or not attend the Bible reading period or that any stigma is attached to a student who is excused from attending.

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### C. The Evidence Offered by Appellees

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The appellees contend that the continuance of this traditional Bible reading custom violates their constitutional rights and in support of their contention offered the following evidence at the second trial when testimony was taken concerning the operation of the presently existing Bible reading statute which provides for the excuse of those students who do not wish to attend.

Edward Lewis Schempp, the father, testified that under the prior Act, which made no provision for excuse, he had objected to his children being exposed to the reading of the King James Bible because it was against his family's religious beliefs. He stated that "theoretically" he would have liked to have had his children excused from the earlier Bible reading practice (R. 214). He testified that he was familiar with the excuse provision of the new Act (R. 211), but that he had not elected to have his children excused because by so doing he believed that his children would be considered "odd balls", atheists, un-American, "immoral and other things" (R. 214). He stated that under the "mechanics", as he described them, of the Bible reading practice at Abington High School (R. 215-218) it would be difficult for the school to arrange to excuse a child (R. 216, 218) and that being made to stand outside the classroom in the hall was a form of punishment at the



school (R. 218). On cross-examination, Mr. Schempp admitted that his only knowledge of the Bible reading practice conducted at Abington High School was what his children had told him (R. 219), that he had never heard of a child at the Abington High School being made to stand outside a classroom for not attending Bible reading (R. 219), and that he had never discussed the problem of Bible reading or being excused therefrom with the Superintendent or any administrative officer in the Abington Township School District (R. 219).

Roger Schempp, the son, testified that he was a student at Abington High School, that he had been present at the morning "routine" at that school and that his father had correctly described such routine in his testimony (R. 221).

The foregoing represents all of the evidence produced by appellees in support of their contention that the amended Bible reading act of the Commonwealth of Pennsylvania which is before this Court violates their constitutional rights and should be struck down.

Counsel for appellees argues that appellees' case also rests upon the testimony offered at the first trial under the old Bible reading statute (R. 221). Such testimony, we submit, has no probative value now since it concerned only the former practice which required that all students attend, and that teachers must conduct the Bible reading on pain of dismissal.

Ellory Schempp's testimony at the first trial that he was compelled to attend Bible reading is now totally irrelevant not only because he has been graduated from the Abington High School but also because, under the new Act, he admittedly could have been excused.

All of the testimony of Donna and Roger Schenapp concerning the Bible reading practice at the Huntingdon Junior High School is now equally irrelevant since neither is now a student at the Huntingdon Junior High School. Nor can the testimony of appellees' expert, Dr. Grayzel, as to the effect on a Jewish student of listening to New Testament reading, be of any probative value now since, under the present law, no student need be present when the Bible, Old Testament or New, is being read. In short, every word of appellees' testimony, offered at the first trial, was concerned with a practice in which all the children, including these minor appellees, were compelled to attend. Such practice no longer exists.

The weakness of appellees' case is most clearly understood when it is realized that none of them testified that the present excusatory Bible reading practice, which is the subject of this suit, deprives them of their religious freedoms or interferes with the free exercise of their religious beliefs. Donna (R. 81-82), Roger (R. 77-79) and Ellory (R. 13-14) testified in the first trial that under the old compulsory Act the Bible reading practice confused and aggrieved them; yet not one of them has come forward to say that the practice under the new Act also confuses and aggrieves them. Since Ellory has been graduated the case as to him is moot, but Donna did not testify at the hearing held following the passage of the new Act, and Roger, who did testify, said only that his father had correctly described the new practice. Roger did not complain of the new practice as he had complained at the first trial of the old non-excusatory practice.

### D. There Is No Interference With Appellees' Free Exercise of Religion

A most thorough and sympathetic scrutiny of appellees' evidence indicates that it shows not that their right to exercise freely their religious consciences or beliefs are affected, but only that Mr. Schempp himself believes that his son would be considered an "odd ball" if he were to be excused from the Bible reading practice, a belief which, surprisingly enough, his son Roger did not support by his own testimony. This is rather slender support for a charge of unconstitutionality. Such evidence does not show that Roger was considered by his classmates to be an "odd ball" nor that his father believed his classmates considered him an "odd ball". All it showed was the father's belief that if Roger were excused from the practice Roger's classmates would consider him an "odd ball". The applicability of the Constitution to the contentions here asserted was well stated by the late Mr. Justice Jackson, in his concurring opinion in *McCullum v. Board of Education*, 333 U.S. 203 (1948), at pp. 232-33:

"But here, complainant's son may join religious classes if he chooses and if his parents so request, or he may stay out of them. The complaint is that when others join and he does not, it sets him apart as a dissenter, which is humiliating. Even admitting this to be true, it may be doubted whether the Constitution which, of course, protects the right to dissent, can be construed also to protect one from the embarrassment that always attends nonconformity, whether in religion, politics, behavior or dress. Since no legal compulsion is applied to complainant's son

*himself and no penalty is imposed or threatened from which we may relieve him, we can hardly base jurisdiction on this ground."*

In the final opinion of the court below, Judge Biggs stated (R. 233):

"We hold the statute as amended unconstitutional on the ground that it violates the 'Establishment of Religion' clause of the First Amendment made applicable to the Commonwealth of Pennsylvania by the Fourteenth Amendment. We find it unnecessary to pass upon any other contention made by the plaintiffs in respect to the unconstitutionality of the statute or of the practices thereunder."

Although this would appear to rule out of the case the question of "free exercise", prudent advocacy demands exposition of this point.

The Bible reading practice in question does not entail worship by those attending; it does not require any profession of faith or expression of belief. To the extent that attendance alone may be regarded as a violation of conscience (as in *Barnette*), the excuse provision in the 1959 Act precludes this from being a violation of conscience.

Appellees argue that the excuse provision is not enough. They contend that the need for requesting excuse is a governmental forcing of a profession of belief or dis-

<sup>5</sup> In this sense, the Bible reading practice is clearly less "religious" than the flag salute exercise in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), where Mr. Justice Jackson, in the opinion of the Court, found: "Here, however, we are dealing with a compulsion of students to declare a belief." (319 U.S. 624, at 631.)

belief, and results in social disapproval of those excused. This contention is totally unsupported by logic or by the facts. No profession of belief or belief itself is required of those attending, and choosing to exercise the excuse provision merely reflects some unidentifiable ground for non-attendance.

While there is no evidence of social disapproval in the record, if it is assumed that social disapproval would result, this does not render the prescribed practice unconstitutional. The "free exercise" clause should and does protect and encourage individual freedom of conscience, but it does not and should not compel the cessation of practices, otherwise legitimate, merely to protect individual "dissenters" thereto from possible unpopularity or embarrassment. This much is clear from *Barnette*<sup>\*</sup> and from Justice Jackson's concurring opinion in *McCullum*, *supra*.

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<sup>\*</sup> This clear meaning of the "free exercise" clause was also delineated by Mr. Justice Frankfurter in his dissent in *Barnette*, 319 U.S. at 662:

"That which to the majority may seem essential for the welfare of the state may offend the consciences of a minority. But, so long as no inroads are made upon the actual exercise of religion by the minority, to deny the political power of the majority to enact laws concerned with civil matters, simply because they may offend the consciences of a minority, really means that the consciences of a minority are more sacred and more enshrined in the Constitution than the consciences of a majority."

POINT II

THE COURT BELOW ERRED WHEN IT HELD THIS CASE WAS GOVERNED BY *McCOLLUM V. BOARD OF EDUCATION* FOR THE BIBLE READING PRACTICE IS FUNDAMENTALLY DIFFERENT FROM THE PROGRAM OF RELIGIOUS INSTRUCTION IN *McCOLLUM* AND FROM ALL OTHER RELIGIOUS PRACTICES HERETOFORE CONSIDERED BY THIS COURT. APPELLEES' ATTACK UPON THE BIBLE READING PRACTICE RAISES A CONSTITUTIONAL ISSUE NEVER BEFORE DETERMINED BY THIS COURT

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The First Amendment to the Constitution reads in part as follows:

"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . ."

In light of the decision of the court below, this Court must determine whether the Pennsylvania Bible reading practice prescribed by Section 1516 of the Public School Code of 1949, as amended December 17, 1959, constitutes an "establishment of religion" within the meaning of the First Amendment.

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**A. The Pennsylvania Bible Reading Practice Does Not Involve Proselytizing, Religious Indoctrination or Instruction**

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In the final opinion of the court below (201 F. Supp. 815) Judge Biggs stated (R. 233):



"The case at bar is governed by *McCullum v. Board of Education*, 333 U.S. 203 (1948). Its essential facts and those of *McCullum* are quite similar. They need not be compared here. . . ."

We respectfully submit that the court below erred in holding that this case is governed by *McCullum*.

In *McCullum*, this Court held unconstitutional a program of "released time" religious education operated in the classrooms of the public schools of Champaign, Illinois. The declared and the only purpose of the Champaign program was to provide formal religious instruction for students grouped according to their sectarian preferences. In the words of Mr. Justice Frankfurter, at 333 U.S. 226, the "candid purpose" of the Champaign program was "sectarian teaching". This is not true of the Bible reading practice at the Abington High School. The record here is devoid of evidence to show that the "essential facts" in the instant case are "quite similar" to those in *McCullum* as stated by Judge Biggs. Unlike *McCullum* there is not at Abington nor can there be any instruction, teaching, proselytizing or indoctrination in connection with Bible reading because the statute itself provides that no comment can be made. The voluntary listening to ten verses of the Bible, selected and read without comment by one of the students of the radio and television course is not even remotely similar to the program for religious instruction struck down in the *McCullum* case. That the element of proselytizing and religious instruction must be present to warrant the application of the *McCullum* doctrine was recently expressed by Mr. Justice Douglas in his concurring opinion in *Engel v. Vitale*, 370 U.S. 421 (1962), at p. 439:

"*McCullum v. Board of Education*, 333 U.S. 203, does not decide this case. It involved the use of pub-

lie school facilities for religious education of students. . . . In the present case, school facilities are used to say the prayer and the teaching staff is employed to lead the pupils in it. There is, however, no effort at indoctrination and no attempt at exposition. Prayers, of course, may be so long and of such a character as to amount to an attempt at the religious instruction that was denied the public schools by the McCollum case. But New York's prayer is of a character that does not involve any element of proselytizing as in the McCollum case."

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**B. The Pennsylvania Bible Reading Practice Does Not Require or Contemplate the Performance of a Religious Act**

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In *Torcaso v. Watkins*, 367 U.S. 488 (1961), this Court held unconstitutional a Maryland statute that required an individual to profess a belief in a Supreme Being as a condition to holding public office. In *Engel v. Vitale*, 370 U.S. 421 (1962), this Court held unconstitutional both the action of the State Board of Regents of New York in composing an official prayer and suggesting its daily recitation in the public schools and the school district's resolution ordering such recitation. Saying such prayer, this Court held, would be "a solemn avowal of divine faith and supplication for the blessings of the Almighty."

In both of these cases the statute or regulation held unconstitutional either required or suggested the performance of an affirmative act which would evidence the religious belief of the actor. This is not true of the Bible reading practice for the suggested passive act of listening can in no way evidence the religious beliefs or disbeliefs

of the listener. It contemplates merely the exposure to a book which is undoubtedly one of the greatest written sources of the ethical structure of our society. No affirmative act of accepting, professing or believing in what is being listened to is either required by the Bible reading practice or necessary to give meaning and purpose to the practice. This follows because readings from the Bible, wholly apart from whatever religious significance they may have, also may contain literary beauty, historical significance and moral values. Thus, any student, regardless of his religious beliefs or disbeliefs can gain much of secular value from listening to the Bible being read. This is not so with the Maryland oath of office or the Regents' prayer, for an oath professing belief in a Supreme Being or a prayer asking His mercy is and can be nothing other than a purely religious act.

Appellees claim that the student's act of choosing whether he will be present during the Bible reading is an act that professes his belief or disbelief. This cannot be true, for if the student elects to listen no one can tell whether he believes or disbelieves what he hears, whether he listens just because his classmates do, whether he finds beauty in the language, or whether he remains in his seat for any of a countless number of other reasons. If he elects to absent himself, it could mean that he disbelieves so strongly that he cannot bear to even listen, that he believes so strongly that he will listen only when it is read liturgically, that he holds a shade of belief or disbelief between these two extremes, or that he has a reason for absenting himself wholly unrelated to matters of religion, conscience or belief.

In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1942), this Court struck down a regu-

lation of the State Board of Education which required all teachers and students to make a daily pledge of allegiance to the flag for it was shown that performing such pledge was considered an anti-religious act by Jehovah's Witnesses. The pledge of allegiance, unlike the Maryland oath or the Regents' prayer, is not a purely religious act, in fact only a few consider it so. However, as to those few, this Court held that they need not comply since otherwise they would be forced to perform what they considered to be an affirmative anti-religious act. In the Bible reading practice no affirmative act, religious or otherwise, is required of anyone whether he chooses to listen to the Bible or not.

It is therefore respectfully submitted that it is totally unrealistic to argue that listening to the reading of ten verses of the Bible daily at the opening of Pennsylvania's public schools is an "establishment of religion" within the meaning of the First Amendment in the absence of any compulsion to perform an act of faith, to assert a belief or disbelief of any kind, or to participate in any program designed to indoctrinate or proselytize.

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**C. Appellees' Objection to the Pennsylvania Bible Reading Practice Is Based on the Novel Contention That a Practice Which Evidences the Religious Origins and Traditions of the Nation Constitutes an "Establishment of Religion" in Violation of the First Amendment**

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Since the Bible reading program is completely voluntary for all students, since it is not designed to provide religious indoctrination for even those students who wish to participate, and since it does not require or even sug-

gest the performance of a religious act, the only basis for appellees' contention that the practice be forbidden to all must be their belief that since the Bible itself, as a document, does possess religious significance, that any use of it authorized by the state must, of necessity, violate the First Amendment to the Constitution. Because the vast majority of the people of Pennsylvania may believe that the Bible possesses religious significance, that it is in many ways a symbol of the religious origins and traditions not only of Pennsylvania but this nation, it does not follow that daily reading of the Bible at the opening of public schools constitutes a religious ceremony or is an unconstitutional "establishment of religion". By their long-standing acceptance and support of this program, culminating in the amendment to the statute here under consideration, the people of Pennsylvania have long demonstrated that the reading of the Bible is a good custom in their schools for they believe that much of secular value can be gained by the listener regardless of what, if any, religious significance he attributes to the text being read.

Consequently, the fundamental issue in this case is what does the First Amendment to the Constitution require us to do with one of the old established customs of our country—a custom that, although voluntary and with

Annexed to this brief as an Appendix is a compilation of statutory, decisional and administrative references showing that twenty-four other states and the District of Columbia require or expressly permit the reading of the Bible in public schools. In 1961 there were 23,146,376 pupils enrolled in full-time public elementary and secondary day schools in these Bible reading jurisdictions according to the United States Department of Health, Education and Welfare, Office of Education, Publication OE-20067-61, Circular No. 676 (1962) entitled "Fall 1961 Enrollment—Teachers and School Housing", page 10.

secular values, also in some way reflects the religious origin and tradition of this nation. It is respectfully submitted that this question is novel with this Court and that the cases heretofore decided did not concern this precise issue with which the Court is now confronted.



**POINT III**

**THE NEUTRALITY TO RELIGION REQUIRED BY THE FIRST AMENDMENT MEANS THAT THE GOVERNMENT CANNOT BE FORCED BY THE RELIGIOUS OR BY THE NONRELIGIOUS TO ADD TO OR SUBTRACT FROM THE TRADITIONAL AND VOLUNTARY RELIGIOUS LEAVEN THAT HAS ALWAYS EXISTED IN OUR PUBLIC LIFE**

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**A. This Nation Is and Always Has Been a Religious People as Is Evidenced by Many of the Customs and Traditions in Our Public Life**

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An analysis of the cases dealing with the application of the First Amendment reveals a consistently reiterated judicial concept concerning the status of religion in this nation in relation to the religious freedoms protected by the Constitution. The inevitable conclusion from the decided cases is that we are today and always have been a religious people. We believe this conclusion would be accepted by even a casual student of this nation's history or routine observer of this nation's present public life. We need not here set forth the religious convictions of the Founding Fathers, the invocations of the Almighty in our cherished national documents, the prayers in our legislative halls, the military chaplains, the use of religious inscriptions on our coinage, the tax exemptions for church property and the myriad other manifestations of the re-

ligious leaven in our public life.<sup>8</sup> They are well known to this Court and their significance has often been affirmed by it:

"There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning; they affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations of private persons; they are organic utterances; they speak the voice of the entire people."

*Holy Trinity Church v. United States*, 143 U.S. 457, 470 (1892).

"We are a religious people whose institutions presuppose a Supreme Being."

*Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

A further conclusion to be found in the cases is that the First Amendment does not require that the government be hostile or unfriendly to religion. Rather, it presupposes and requires an attitude of neutrality on the part of the government.

"The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State . . . That is the common sense of the matter. Otherwise the state and religion would be aliens to each other, hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be

<sup>8</sup> For an excellent summation of such manifestations, reference may be made to Appendices to Brief of Respondents filed in *Engel v. Vitale*, at No. 468 October Term, 1961, in the Supreme Court of the United States.

permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'so help me God' in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: 'God save the United States and this Honorable Court'."

*Zorach v. Clauson*, 343 U.S. at 312-13.

"... The First Amendment leaves the Government in a position not of hostility to religion but of neutrality. The philosophy is that the atheist or agnostic—the nonbeliever—is entitled to go his own way. The philosophy is that if government interferes in matters spiritual, it will be a divisive force. The First Amendment teaches that a government neutral in the field of religion better serves all religious interests."

*Engel v. Vitale*, 370 U.S. 421, 443 (concurring opinion, 1962).

That the Constitution permits the government to cooperate with religious authorities was indicated by Mr. Justice Douglas in the *Zorach* case, *supra*, when he said at page 314:

"... To hold that it may not would be to find in the Constitution a requirement that the government

show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe . . .

To strike down as a violation of the First Amendment Pennsylvania's amended Bible reading statute would constitute a departure from the traditional relationship between government and religion and would in fact be hostile to those who wish to preserve in our public schools a practice reflecting and consistent with the legal concept that this nation is indeed a religious people.

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**B. Neutrality Means That the Government Shall Neither Add to Nor Subtract From the Religious Leaven of This Nation**

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Our nation admittedly has a leaven of religious content in its public life. The Constitution requires our government to be neutral toward religion. The legal problem is how should this Court combine these two concepts in determining the constitutionality of Pennsylvania's traditional Bible reading practice? We here suggest that the solution is that government should neither help nor harm either the religious or the nonreligious; that it should not allow the religious to add to the religious leaven nor permit the nonreligious to subtract from it? In Mr. Justice Douglas' concurring opinion in *Engel v. Vitale*, 370 U.S. 421, 443, he said:

"But 'if a religious leaven is to be worked into the affairs of our people, it is to be done by individuals and groups, not by the Government'. *McGowan v. Maryland*."

If the government must be neutral rather than hostile to religion, would not the above quotation be equally valid if it read:

"... if a religious haven is to be worked out of the affairs of our people, it is to be done by individuals and groups, not by the Government."

The Bible reading practice in our public schools, like the prayers in our legislative halls, the chaplains in our military forces, "So help me God" in our courtroom oaths and the numerous similar traditions and customs that exist in our public affairs, is all a part of a way of life that has been accepted and cherished by generations of Americans. They make up the religious haven of our culture and evidence the religious origin and nature of our people. Would it be neutral for the government now to rip out all such customs from our public life? Certainly this Court, in its most recent decision concerning the First Amendment, did not indicate that such customs, even though translated into statutes by the states, must be removed. In *Engel v. Vitale*, 370 U.S. 421, at footnote 21, page 435, the Court said:

"There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the

unquestioned religious exercise that the State of New York has sponsored in this instance."

Is it neutral for the government to aid the nonreligious in their attempt to establish nonreligion as the ruling concept? Does not the religious neutrality required by the First Amendment mean that neither the religious nor the nonreligious may use the government to improve their respective positions? The only alternative to such neutrality would be a policy that required the government to remove from public life all of the admittedly existing religious heaven and in its place establish an absolute nonreligious state. Such a policy could not be considered by reasonable men to be anything other than one of hostility toward religion as a matter of law.

\* Dean Emeritus Luther A. Weigle of the Yale Divinity School in his introduction to the book GOD IN OUR PUBLIC SCHOOLS, by W. S. Fleming, at page 26, said the following in this connection:

"A system of education which gives no place to religion is not in reality neutral but exerts an influence, unintentional though it be, against religion. . . . The omission of religion from the public schools conveys a condemnatory suggestion to the children.

William Clayton Bower, a former professor at the University of Chicago, in his book, THE CHURCH AND STATE IN EDUCATION (University of Chicago Press), page 33, has this to say:

"In the church and in the religious home, the growing person is led to believe that religion is the most important concern of life, while in the school religion is relegated to a position of unimportance by being treated with silence and neglect. The result is more serious than appears on the surface. Without intending it, the school is placed in the position of exerting a negative influence regarding religion since what appears to be neutrality turns out practically to be a discrediting of religion."



### C. The Policy of Neutrality Is Consistent With the Prior Decisions of This Court

We submit that the neutrality to religion required by the First Amendment impels the conclusion that the court below erred in holding Pennsylvania's Bible reading practice unconstitutional as an "establishment of religion". To reverse the court below would be consistent with the prior decisions of this Court wherein the Court disallowed attempts to *add* to the religious leaven of the nation when it struck down a plan to introduce admittedly religious instruction in the public schools (*McCullum v. Board of Education*, 333 U.S. 203 (1948)) and when it prevented public officials from writing a *new* prayer to be said in the public schools (*Engel v. Vitale*, 370 U.S. 421 (1962)). Neither religious instruction in the public schools nor the composing of school prayers by public officials was part of the religious tradition of this country. That there is a valid distinction between the newly composed and the traditional was noted by Professor Arthur E. Sutherland, Jr. in his recent article, *Establishment According to Engel*, 76 Harv. L. Rev. 25 (1962), where he says, at p. 38:

... And a constitutional flaw of the Regents' Prayer may be its comparative novelty. America is an old song. There is common sense in the distinction between the long-established and the novel. A man can reasonably say that what has become traditional is less constitutionally objectionable than an innovation.<sup>30</sup> At the margins of the minimally tolerable, such fine differences are not ridiculous."

"<sup>30</sup> The degree of obscenity which is legally tolerated seems to bear a relation to the age of the lit-

erature. In modern dress the Miller's Tale and the Reeve's Tale would raise interesting questions under *Roth v. United States*, 354 U.S. 476 (1957). And in measuring procedural due process, what men are used to is relevant. See, e.g., the opinion in *Den ex dem. Murray v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856)."

In the same pattern of neutrality this Court did not subtract from the religious leaven of the country when it held a religious oath of office need not be observed by a nonbeliever for it did not hold that the oath could not be made by a believer (*Torcaso v. Watkins*, 367 U.S. 488 (1961)). In the *Barnette* case (319 U.S. 624 (1942)) this Court likewise did not hold that the custom of pledging allegiance must be denied to all school children. Again in the Sunday Blue Laws case, this Court held that although the traditional observance of Sunday as a day of rest may be amply justified under the police powers of the state, such customary observance need not be struck down merely because it happened to be part of the religious leaven of our country (*McGowan v. Maryland*, 366 U.S. 420 (1961)).

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**D. A Decision by This Court To Strike Down the Bible Reading Practice Would Provide the Means Whereby Every Vestige of the Religious Traditions of This Nation Could Be Removed From Public Life**

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If this Court were to strike down Pennsylvania's Bible reading practice it would open a Pandora's box of litigation which could serve to remove from American public life every vestige of our religious heritage. Since the

Bible reading practice is voluntary and has secular values, its prohibition by this Court would logically impel the conclusion that the other traditions must fall. Certainly "God save this Honorable Court", "So help me God" and "In God We Trust" would fall, for such expressions have no secular meaning, there is nothing voluntary about a court of law and no one has a choice as to which currency he will use. The chaplains of our legislative bodies and our military forces could not be allowed to continue to conduct, at the nonreligious taxpayers' expense, their religious functions. Tax exemptions for church property would also fall, as well as statutory draft exemptions for conscientious objectors. With regard to the public schools, perhaps established school holidays could continue if they were renamed, but even this might be construed as only colorable compliance with the requirements of the Constitution. It would seem that any official use of the Christian calendar with its B.C. and A.D. must be discontinued and the seven day week, being of Biblical origin, should become either a six or an eight day period. The traditional day of rest, rather than falling on the Christian Sunday, or the Jewish Sabbath, should fall on a nonreligious Wednesday or Thursday, although the latter, being a corruption of Thor's day, may be objectionable because of its Germanic religious connotations.

The task facing this Court, if it undertook to remove from the public schools all practices that some might claim contain religious connotations, is well set forth in the following statements by Mr. Justice Jackson and Mr. Justice Frankfurter:

"To me, the sweep and detail of these complaints is a danger signal which warns of the kind of local

controversy we will be required to arbitrate if we do not place appropriate limitation on our decision and exact strict compliance with jurisdictional requirements. \* \* \* If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant law suits.

• • • • •

"I think it remains to be demonstrated whether it is possible, even if desirable, to comply with such demands as plaintiff's completely to isolate and cast out of secular education all that some people may reasonably regard as religious instruction.

• • • • •

"We must leave some flexibility to meet local conditions, some chance to progress by trial and error. \* \* \* The task of separating the secular from the religious in education is one of magnitude, intricacy and delicacy. \* \* \* If with no surer legal guidance we are to take up and decide every variation of this controversy, raised by persons not subject to penalty or tax but who are dissatisfied with the way schools are dealing with the problem, we are likely to have much business of the sort." (Jackson, J., concurring in *McCullum*, 333 U.S. at 235, 237-38.)

"... The requirement of Bible-reading has been justified by various state courts as an appropriate means of inculcating ethical precepts and familiarizing pupils with the most lasting expression of great

English literature. Is this Court to overthrow such variant state educational policies by denying states the right to entertain such convictions in regard to their school systems, because of a belief that the King James version is in fact a sectarian text to which parents of the Catholic and Jewish faiths and of some Protestant persuasions may rightly object to having their children exposed? On the other hand the religious consciences of some parents may rebel at the absence of any Bible-reading in the schools. See *Washington ex rel. Clithero v. Showalter*, 284 U.S. 573. Or is this Court to enter the old controversy between science and religion by unduly defining the limits within which a state may experiment with its school curricula? The religious consciences of some parents may be offended by subjecting their children to the Biblical account of creation, while another state may offend parents by prohibiting a teaching of biology that contradicts such Biblical account. Compare *Scopes v. State*, 154 Tenn. 105, 289 S.W. 363. What of conscientious objections to what is devoutly felt by parents to be the poisoning of impressionable minds of children by chauvinistic teaching of history? This is very far from a fanciful suggestion for in the belief of many thoughtful people nationalism is the seed-bed of war.

. . . . .

"That which to the majority may seem essential for the welfare of the state may offend the consciences of a minority. But, so long as no inroads are made upon the actual exercise of religion by the minority, to deny the political power of the majority to enact laws concerned with civil matters, simply because they

may offend the consciences of a minority, really means that the consciences of a minority are more sacred and more enshrined in the Constitution than the consciences of a majority." (Frankfurter, J., dissenting in *Barnette*, 319 U.S. at 659, 660 and 662.)

While we do not suggest that these other traditions would immediately fall upon the invalidation of our Bible reading statute, it is not far-fetched to believe that many of these customs could eventually meet the same fate.



## POINT IV

## APPELLEES DO NOT HAVE STANDING TO INVOKE THE JURISDICTION OF THIS COURT

Appellees have contended that even if the provision for excuse from attending Bible reading disposes of their argument that the Bible reading statute prohibited the free exercise of religion, it does not affect their argument that the statute is an establishment of religion. Such contention ignores the fundamental principle that if the appellees are not deprived of any constitutionally protected freedom, they have no standing to invoke the Constitution, and the Court has no jurisdiction to pass upon the constitutionality of the Act in question.

The First Amendment becomes binding upon the states only by virtue of the due process clause of the Fourteenth Amendment. In order to have the Court pass on their contention that an Act of the General Assembly of the Commonwealth of Pennsylvania constitutes an unconstitutional establishment of religion, the appellees must show that they are persons who, as a result of the enforcement of the Act, are deprived of life, liberty or property without due process of law.

Even more fundamental than the requirement that the plaintiff show a deprivation of liberty or property under the Fourteenth Amendment is the limitation on the power of this or any Federal court to declare a legislative act unconstitutional. Under Article III, Section 1 of the Constitution, the only power exercised by the Supreme

Court and any Federal court is judicial power. Under Article III, Section 2, this power extends only to "cases or controversies" within its meaning. It has therefore become well settled that the Court has no jurisdiction to render an advisory opinion as to the constitutionality of any legislative act of either Congress or a State Legislature. This fundamental limitation on the judicial power under the Constitution remains today, as stated by Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat. 264, 405 (1821):

"... The article does not extend the judicial power to every violation of the constitution which may possibly take place, but to 'a case in law or equity,' in which a right, under such law, is asserted in a court of justice. If the question cannot be brought into a court, then there is no case in law or equity, and no jurisdiction is given by the words of the article. But if, in any controversy depending in a court, the cause should depend on the validity of such a law, that would be a case arising under the constitution, to which the judicial power of the United States would extend."

A "case or controversy" within the judicial power of the United States courts exists only when there is a litigation affecting the rights of the parties as to their persons or property. It is essential to the existence of jurisdiction that the plaintiff show a legally protected interest, personal to him, which is invaded or threatened by the actions of the defendant. In *Frothingham v. Mellon*, 262 U.S. 447, 488 (1922), the Court, speaking through Mr. Justice Sutherland, said:

"... We have no power *per se* to review and annul acts of Congress on the ground that they are

unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. If a case for preventive relief be presented the court enjoins, in effect, not the execution of the statute; but the acts of the official, the statute notwithstanding."

This Court, in *Poe v. Ullman*, 367 U.S. 497 (1961), declined to pass on the constitutionality of the Connecticut statute prohibiting the use of contraceptive devices and the giving of medical advice on the use of such devices, on the ground that there was not a sufficient showing on the record that the plaintiffs were threatened with imminent prosecution.

The Opinion of the Court by Mr. Justice Frankfurter heavily underscores the limitations upon the power of the Supreme Court and Federal Courts to adjudicate constitutional issues. The necessity of a "case or controversy" is only one of the limitations on that power, which is further circumscribed by the principle that the Court will not entertain constitutional questions except in cases

where the constitutional determination is strictly necessary in order for it to decide a real case. The Court said (367 U.S. 503-505):

"The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity." *Parker v. County of Los Angeles*, 338 U.S. 327, 333. See also *Liverpool, N. Y. & P.S.S. Co. v. Commissioners*, 113 U.S. 33, 39. The various doctrines of 'standing,'<sup>5</sup> 'ripeness,'<sup>6</sup> and 'mootness,'<sup>7</sup> which this Court has evolved with particular, though not exclusive, reference to such cases are but several manifestations—each having its own 'varied application'<sup>8</sup>—of the primary conception that federal judicial power is to be exercised to strike down legislation, whether state or federal, only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action . . . *Sterns v. Wood*, 236 U.S. 75; *Texas v. Interstate Commerce Comm'n*, 258 U.S. 158; *United Public Workers v. Mitchell*, 320 U.S. 75, 89-90. 'This court can have no right to pronounce an abstract opinion upon the constitutionality of a State law. Such law must be brought into actual, or threatened operation upon rights properly falling under judicial cognizance, or a remedy is not to be had here.' *Georgia v. Stanton*, 6 Walk. 50, 75, approvingly quoting Mr. Justice Thompson, dissenting, in *Cherokee Nation v. Georgia*, 5 Pet. 1, 75; also quoted in *New Jersey v. Sargent*, 269 U.S. 328, 331. 'The party who invokes the power [to annul legislation on grounds of its unconstitutionality] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct in-

jury as the result of its enforcement. . . . *Massachusetts v. Mellon*, 262 U.S. 447, 488.<sup>9</sup> "

Thus, in *Doremus v. Board of Education*, 342 U.S. 429 (1952), in which the plaintiffs contended that a New Jersey statute providing for reading the Bible in public schools was unconstitutional, the Supreme Court dismissed the appeal as moot because the child of the plaintiff-parent had graduated from school and the rights of such child were therefore moot. Despite plaintiffs' contention that they were still entitled to maintain the appeal as citizens and taxpayers, the Supreme Court held that the suit could not be maintained as a taxpayer's action because the plaintiffs had not shown that as taxpayers they had any financial interest in the case, or were in any immediate danger of sustaining direct injury in measurable amount, or that the practice of reading the Bible in the school added any sum to the cost of conducting the school. The appeal was dismissed for lack of a justiciable controversy.

The present action cannot be maintained as a taxpayer's suit, nor has it ever been seriously argued that it could be. The appellees do not even allege that they pay any taxes to the Abington Township School District. They have not alleged that the practice of Bible reading adds any measurable amount to the cost of conducting the schools. In any event, it is clear under the decision of the Supreme Court in the *Doremus* case that such a minimal expenditure as might be involved in the purchase of Bibles is not a measurable appropriation of public funds of which a taxpayer is entitled to complain.

The appellees attempt to bring themselves within the decision of the Supreme Court in *McCullum v. Board of Education*, 333 U.S. 203 (1948), wherein the plaintiff was



permitted to maintain an action in the dual capacity as taxpayer and parent of a child in school. However, that case involved the use of classrooms for programs of admittedly protracted religious instruction by priests, rabbis, and ministers. Subsequent decisions of the Court in the *Doremus* case and in *Zorach v. Clauson*, 343 U.S. 306 (1952), demonstrate that the Court will not invalidate a practice alleged to be an unconstitutional establishment of religion unless the plaintiffs show that they have sustained injury either as taxpayers or as parents of pupils compelled to participate in a religious ceremony in violation of their constitutional freedom of worship. In *Zorach* the Court sustained the constitutionality of the New York released time program on the ground that participation in the program of religious instruction was entirely voluntary, and because there was no use of the tax-supported school property for religious purposes. The Court distinguished *McCullum* on the ground that all of the costs of the New York program were paid by the religious organizations and not by the public school district.

The position of the Supreme Court in *Doremus* was foreshadowed in the concurring opinion of Mr. Justice Jackson in the *McCullum* case itself. He there pointed out that a Federal court may not interfere with local school authorities unless they are invading either a property right or a personal liberty protected by the Federal Constitution. Such a challenge to a local statute or practice should come before the Court in either of two ways: (1) when a person is required to submit to some religious rite or instruction as in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); or (2) when a taxpayer charges that there is a measurable burden on taxpayers for funds expended for unconstitutional pur-



poses, as in *Everson v. Board of Education*, 330 U.S. 1 (1947).

Applying these principles to the facts of the instant case, it is apparent that as to one of the original plaintiffs, the son Ellory Schempp, the situation is now the same as in *Doremus*. Ellory has been graduated from the Abington Township High School and no injunction which this Court might otherwise grant can protect or affect his rights. But the other Schempp children are still in the Abington Township High School, and the case is not moot as to them in the sense that it is moot as to Ellory. Nevertheless, their action under the amended Act of 1959 cannot be maintained on their behalf by themselves or their parents since there has been no evidence presented to show that they have been compelled to relinquish any constitutional liberty. No such showing could be made since the statute and practice presently before this Court make attendance at Bible reading exercises purely voluntary.

Although it is recognized that the decision in *Engel v. Vitale*, 370 U.S. 421 (1962), indicates that this Court may have revised its previous holdings concerning the doctrine of "standing in court",<sup>10</sup> appellants contend that since appellees have no legally protected interest which is

<sup>10</sup> Sutherland, Arthur E., Jr., *Establishment According to Engel*, 76 Harv. L. Rev. at 26-27, 35 (1962):

"But in the *Prayer Case* the Court finds no actionable coercion of children to demonstrate dissent; the majority opinion adopts, instead, a quite different formula—that a classroom exercise, if once found to be an 'establishment of religion,' becomes untenable under the fourteenth amendment, even if no schoolchild is subject to 'coercion,' and even if no plaintiff demonstrates any unconstitutional expenditure of taxpayers' money. One finds asserted in *Engel* no requirement that a litigant, if he would invoke judicial power to

injured or threatened by the Bible reading statute, they have no standing to maintain the action and the Court has no jurisdiction to determine in the abstract whether the statute would otherwise be unconstitutional.

forbid governmental action, must show that by it he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.<sup>4</sup> *Engel* thus suggests that the Supreme Court has somewhat revised its previous ideas concerning 'standing in court,' concerning, that is, the type of grievance a litigant must experience before the federal judiciary will intervene to forbid state governmental activity. The opinions seem to take as premise a judicial function rather more expanded than most lawyers had come to find usual. Here, rather than in the specific issue decided, may turn out to be the ultimate importance of the case."

.....

"In the *Prayer Case*, the Supreme Court, finding insufficient jurisdictional hardship imposed on the plaintiffs' children, would conventionally have denied certiorari. Absence of proof that the prayer added to school costs had eliminated the only other possible standing, unless *Doremus* was to be disregarded. But the *School Prayer* opinion did not expressly overrule *Doremus*; one wonders if it was overruled in silence. Is there in *Engel* a new doctrine concerning the wrongs against which the fourteenth amendment, judicially enforced, will protect all persons? Where a state does something amounting to 'establishment,' will the Supreme Court enjoin it on the suit of any member of society who dislikes the policy? And is this new doctrine likely to spread beyond religious establishment to other policy judgments?"

## CONCLUSION

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We accordingly respectfully submit that:

1. The Pennsylvania Bible reading practice does not interfere with appellees' free exercise of religion.

2. Since the Bible reading practice does not involve religious instruction or proselytizing nor require or suggest the performance of a religious act, it is not an establishment of religion within the meaning of the First Amendment to the Constitution.

3. The neutrality to religion required of the government by the First Amendment to the Constitution means that the government cannot be forced by appellees to strike down a traditional and voluntary Bible reading practice simply because it may have, in addition to its secular values, certain religious connotations.

4. Appellees do not have standing to invoke the jurisdiction of this Court.

We therefore respectfully submit that the judgment of the court below be reversed, the final decree below be vacated and the case be remanded to the District Court with a direction to enter judgment for appellants.

Dated: January 4, 1963.

Respectfully submitted,

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**APPENDIX**

The following is a summary of state constitutional, legislative, judicial and administrative provisions or rulings requiring or permitting Bible reading in the public schools.

**ALABAMA**

Bible reading is required daily in all public schools. Ala. Code, tit. 52, §542 (Recomp. 1958).

**ARKANSAS**

Bible reading is required daily in all public schools. Pupils may be excused upon request. Ark. Stat. Ann. §§80-1606, 80-1607 (1947).

**COLORADO**

Bible reading without comment is permitted on a voluntary basis under *People ex rel. Vollmar v. Stanley*, 81 Colo. 276, 255 Pac. 610 (1927).

**DISTRICT OF COLUMBIA**

Bible reading is required daily in all public schools. Pupils may be excused upon request. Board of Educ., By-Laws, c. 6, §4.

**DELAWARE**

Bible reading is required in all public schools. 14 Del. Code Ann. §§4102, 4103 (1953).

**FLORIDA**

Bible reading "without sectarian comment" is required daily in all public schools, pursuant to 1 Fla. Stat.

§231.09 (2) (1959). This practice was upheld on a voluntary basis in 1961 in *Chamberlin v. Dade County Board of Public Instruction* (Circuit Ct., Dade Co., case nos. 59-C-4928 and 59-C-8873) (30 U.S.L. Week 2623, Fla. Sup. Ct., June 6, 1962).

### GEORGIA

One chapter from the Bible is required daily reading in the public schools and provision is made for the excuse of any pupils who do not wish to participate. Ga. Code Ann. §§32-705, 32-9903 (1952). See: *Wilkerson v. City of Rome*, 152 Ga. 762, 110 S.E. 895 (1922).

### IDAHO

From 12 to 20 verses must be read without comment from the Bible each day in all public schools. Idaho Code §§33-2705-07 (1947).

### INDIANA

Daily Bible reading is permitted in the public schools. Ind. Stat. Ann. §28-5105 (Burns 1948).

### IOWA

Daily Bible reading in the public schools is permitted and students not wishing to participate may be excused. 1 Iowa Code §280.9 (1958). See: *Knowlton v. Baumhover*, 182 Iowa 691, 166 N.W. 202 (1918); *Moore v. Monroe*, 64 Iowa 367, 20 N.W. 475 (1884).

### KANSAS

Daily Bible reading in the public schools is permitted. Kans. Gen. Stat. Ann. §72-1628 (Supp. 1961). See: *Billiard v. Board of Education*, 69 Kans. 53, 76 Pac. 422 (1904).



**KENTUCKY**

Daily Bible reading in the public schools is required and students not wishing to participate may be excused. Ky. Rev. Stat. §158.170 (Baldwin 1955). This practice was upheld against attack on constitutional grounds in *Hackett v. Brooksville Graded School Dist.*, 120 Ky. 608, 87 S.W. 792 (1905).

**MAINE**

"[R]eadings from the scriptures with special emphasis upon the Ten Commandments, the Psalms of David, the Proverbs of Solomon, the Sermon on the Mount and the Lord's Prayer" are required daily in the public schools. "[E]ach student shall give respectful attention but shall be free in his own forms of worship." 2 Me. Rev. Stat. §145 (1954). See: *Donahoe v. Richards*, 38 Me. 379 (1854).

**MARYLAND**

Bible reading in public schools on a voluntary basis, pursuant to a rule of the Board of School Commissioners of Baltimore City, has been sustained in *Murray v. Curlett*, 228 Md. 239, 179 A. 2d 698 (1962), cert. granted, 31 U.S.L. Week 3116 (U.S. Oct. 8, 1962) No. 119, 1962 Term.

**MASSACHUSETTS**

Bible reading is required daily in the public schools. Pupils not wishing to participate may be excused. Mass. Ann. Laws, c. 71, §71-31 (1958). See: *Spiller v. Inhabitants of Woburn*, 94 Mass. (12 Allen) 127 (1866).

**MICHIGAN**

Bible reading upheld by court without benefit of statute: *Pfeiffer v. Board of Education*, 118 Mich. 560, 77 N.W. 250 (1898).

**MINNESOTA**

Bible reading in the public schools on a voluntary basis is permitted under *Kaplan v. Independent School Dist.*, 171 Minn. 142, 214 N.W. 18 (1927).

**MISSISSIPPI**

Bible reading in the public schools is permitted on a voluntary basis. Const. Art. III, §18, contained in 1 Miss. Code Ann. (1942).

**NEW JERSEY**

At least 5 verses of the Old Testament are required to be read without comment each day in each public school classroom. N. J. S. A. §§18:14-77, 18:14-78 (1940). See *Doremus v. Board of Education*, 5 N.J. 435, 75 A. 2d 880 (1950), appeal dismissed, 342 U.S. 429 (1952).

**NEW YORK**

Bible reading in the public schools on a voluntary basis is permitted. See *Lewis v. Board of Education*, 157 Misc. 520, 285 N.Y.S. 164 (Sup. Ct., N. Y. Co. 1935), modified and affirmed 247 App. Div. 106, 286 N.Y.S. 174 (1st Dept. 1936), appeal dismissed, 246 N.Y. 496, 12 N.E. 2d 172 (1937).

**NORTH DAKOTA**

Bible reading in the public schools is permitted and provision is made for pupils not wishing to participate. 3 N. D. Cent. Code §15:38-12 (1960).

**OHIO**

Bible reading in the public schools is permitted. *Nessle v. Hum.*, 2 O.D. 60, 1 Ohio N.P. 140 (1894). Cf., *Board of Educ. v. Paul*, 10 O.D. 17, 7 Ohio N.P. 58 (1900).

## OKLAHOMA

Bible reading in the public schools is permitted. Okla. Stat., tit. 70, §11-1 (1941).

## TENNESSEE

Bible reading in the public schools is required daily, Tenn. Code Ann., §49-1307(4) (1955). See *Carden v. Bland*, 199 Tenn. 665, 288 S.W. 2d 718 (1956).

## TEXAS

Bible reading is permitted on a voluntary basis in the public schools. *Church v. Bullock*, 104 Tex. 1, 109 S.W. 115 (1908).

Office-Supreme Court, U.S.  
**FILED**

JAN 8 1963

JOHN F. DAVIS, CLERK

**IN THE**  
**Supreme Court of the United States**

**OCTOBER TERM, 1962**

**No. 119**

**WILLIAM J. MURRAY, III, INFANT, BY MADALYN E.  
MURRAY, HIS MOTHER AND NEXT FRIEND, AND  
MADALYN E. MURRAY, INDIVIDUALLY,**  
*Petitioners.*

**v.**

**JOHN N. CURLETT, PRESIDENT, SAMUEL EPSTEIN, MRS.  
M. RICHMOND FARRING, ELI FRANK, JR., DR.  
ROGER HOWELL, HENRY P. IRR, DR. WILLIAM D.  
McELROY, MRS. ELIZABETH MURPHY PHILLIPS,  
JOHN R. SHERWOOD, INDIVIDUALLY, AND CONSTITUTING  
THE BOARD OF SCHOOL COMMISSIONERS OF  
BALTIMORE CITY,**

*Respondents.*

**ON WRIT OF CERTIORARI TO THE COURT OF  
APPEALS OF MARYLAND**

**BRIEF OF RESPONDENTS**

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**GEORGE W. BAKER, JR.,**  
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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1962

No. 119

WILLIAM J. MURRAY, III, INFANT, BY MADALYN E.  
MURRAY, HIS MOTHER AND NEXT FRIEND, AND  
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JOHN N. CURLETT, PRESIDENT, SAMUEL EPSTEIN, MRS.  
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JOHN R. SHERWOOD, INDIVIDUALLY, AND CONSTITUTING  
THE BOARD OF SCHOOL COMMISSIONERS OF  
BALTIMORE CITY,

*Respondents.*

ON WRIT OF CERTIORARI TO THE COURT OF  
APPEALS OF MARYLAND

**BRIEF OF RESPONDENTS**

**OPINIONS BELOW**

The opinions rendered in the courts below are as follows:

1. The Memorandum Opinion of the Superior Court of Baltimore City (Prendergast, J.) is not officially reported, but appears in the Record (R. 8).

2. The opinion of the Court of Appeals of Maryland is officially reported at 228 Md. 239 and 179 A. 2d 698. The opinion also appears in the Record (R. 26).

### **JURISDICTION**

The jurisdiction of this Court is governed by 28 U.S.C. Section 1257 (3).

### **CONSTITUTIONAL PROVISIONS, STATUTES AND ADMINISTRATIVE REGULATIONS INVOLVED**

This case involves:

1. Section 1 of the Fourteenth Amendment to the Constitution of the United States.
2. The First Amendment to the Constitution of the United States.
3. Article 77, Sections 202 and 203 of the Annotated Code of Maryland (Michie, 1957)
4. Section 91 of the Charter and Public Local Laws of Baltimore City (Flack, 1949)
5. Article VI, Section 6 of the Rules of the Board of School Commissioners of Baltimore City, as amended November 17, 1960.
6. Article 77, Section 231 of the Annotated Code of Maryland (Michie, 1957).

All of the applicable portions of the foregoing are set forth verbatim in the Petitioners' Brief, at p. 4.

### **QUESTION PRESENTED**

Does the use of the Lord's Prayer and readings from the Bible in opening exercises in the public schools where provision is made for excuse from attendance, constitute a

violation of the Establishment Clause and Free Exercise Clause of the First Amendment to the United States Constitution, as made applicable to the states by the Fourteenth Amendment?

### STATEMENT OF THE CASE

In 1905, the Board of School Commissioners of Baltimore City (the "Board") adopted Article VI, Section 6 (the "Rule") under its rule-making powers pursuant to Article 77, Section 202 of the Annotated Code of Maryland. The Rule provides in effect for the use of the Bible and or the Lord's Prayer, without comment, during morning opening exercises.

The Petitioners requested and were granted a hearing before the Board, at which time they expressed their objection to compliance with the Rule and asked that it be rescinded. The Board sought the advice of the Attorney General of Maryland, who ruled that the practice in question was not unconstitutional, provided that the Rule be amended to allow objectors to be excused from attending the exercises. The Board amended the Rule accordingly on November 17, 1960. The infant petitioner was thereafter excused from attending the exercises, upon request by his mother.

On December 7, 1960, the Petitioners filed a Petition for a writ of mandamus in the Superior Court of Baltimore City, asking that the Board be commanded to rescind the Rule and to cause the challenged practice to be discontinued. The Respondents' demurrer was sustained by the Superior Court, without leave to amend. The Maryland Court of Appeals affirmed by a four-to-three decision.

A Petition for Certiorari was filed in this Court on May 15, 1962, and was granted on October 8, 1962 (R. 48).

## SUMMARY OF ARGUMENT

### I.

(a) The Establishment Clause "barrier" between Church and State is more of a graduated spectrum or range than a fixed absolute wall. The problem is one of degree. The considerations underlying the fixing of the dividing line between permitted state accommodation on the one hand and proscribed encroachment on the other must be applied anew in each fact situation as it arises.

(b) The Lord's Prayer and the Bible, while religious in origin and framework, are not used in the challenged opening exercises as a form of religious instruction or as a religious service. Rather, these materials are utilized as a source of inspirational appeal to inculcate moral and ethical precepts of value in a salutary and sobering exercise with which to begin the school day. Their use in such a traditional and significant role transcends their religious origins, and does not constitute a sufficient encroachment or impingement to abridge the Establishment Clause.

(c) The *Engel* decision held only that the composition of an official prayer by or for a state agency as part of a governmentally sponsored religious activity abridged the Establishment Clause. The Court disapproved of that degree of Church-State contact which would permit a state official to either compose a prayer for a use prohibited by the Establishment Clause, or to select a prayer composed by another for the same purpose. A contrary decision would have placed the Court in the position of a board of censors for every prayer so composed or selected by a state official.

The use of the Lord's Prayer and readings from the Bible constitute neither the composition nor the sanction-

ing of an "official prayer". Whereas the Regents' Prayer was an unadorned religious exercise, the challenged materials are utilized, not as an "official prayer", but rather as a vehicle whereby the desired level of moral, ethical and inspirational uplifting can be attained. The use of these established and traditional mainsprings of high moral value should not be denied to our public educators.

## II.

An analysis of each type or element of alleged compulsion or coercion reveals that there is no infraction of the Free Exercise Clause. The right to be excused is adequate and ample protection. The affirmative action which is required of one who elects to excuse himself from the opening exercises does not constitute a requirement that he "profess a belief or disbelief in religion", but is simply the use of his Free Exercise Clause privilege.

A "reverse discrimination" would result if the dissenter, to protect his own scruples from offense, could require others to eliminate an activity deemed permissible under the Establishment Clause. While the First Amendment protects the non-believer with the same force as it protects the believer, it was never intended that such right of protection be extended to grant a preference to either.

Coercive pressures, if any, which may be generated by the disapproval of teachers and pupils are not cause for eradication of the opening exercises. The disapproval of others is always the burden of the nonconformist. His privilege of dissent is protected by the right to be excused from the exercises. To spare him the consequences of disapproval by eliminating the exercises, would be to prefer the dissenter over those who do not dissent.



## III.

The consequences of a decision prohibiting the use of the Lord's Prayer and the Bible in opening exercises may be severe and far-reaching. If these exercises are deemed to bear sufficient elements of religiousness to fall within the proscribed Church-State area, it will become increasingly difficult, if not impossible, to maintain that many or all other forms of Church-State contact do not bear equally sufficient aspects of religiousness. Beyond the challenged exercises, the possible distinctions become extremely tenuous. From a legal and logical standpoint, the dividing line should be drawn here to halt the inevitable result of a steadily increasing erosion in a vulnerable area.

## IV.

The traditional use of the challenged materials in morning opening exercises in our public schools has surpassed its religious beginnings and has taken its place as a significant element of our national heritage. The religious influences which saturate and enrich innumerable facets of our public and private life cannot be dissected and discarded without substantial harm to a vital component of our national being.

## ARGUMENT

## POINT I.

**The Establishment Clause of the First Amendment Is Not Violated by the Opening Exercises Conducted in the Public Schools of Baltimore City.**

(a) *The Question of Degree*

The constitutionality of the opening exercises in question must be measured against the Establishment Clause and the Free Exercise Clause of the First Amendment to the Constitution, both of which are operative in this case.

by virtue of the Fourteenth Amendment. As noted by this Court in *Engel v. Vitale*, 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601. (1962), these two clauses have different applications in that they "forbid two quite different kinds of governmental encroachment upon religious freedom." 370 U.S. at 430.

We treat here first the Establishment Clause, putting aside for the moment the considerations presented by the Free Exercise Clause, where issues of coercion and compulsion play a far more decisive role.

The historical origins and background of the Establishment Clause have been thoroughly explored and reviewed in prior opinions of this Court. Another such reexamination here is accordingly deemed unnecessary. See, for example, the very concise but thorough survey in *Engel v. Vitale*, *supra*, 370 U.S. at 425-429. See also *Everson v. Board of Education*, 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947), at 330 U.S. 8-15; *Torcaso v. Watkins*, 367 U.S. 488, 81 S. Ct. 1680, 6 L. Ed. 2d 982 (1961), at 367 U.S. 490-491.

Perhaps the most frequently quoted exposition of the broad meaning and interpretation accorded to the Establishment Clause by this Court is set forth in *Everson*, 330 U.S. at 15-16:

"Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice

religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'

Petitioners here contend that the Establishment prohibition is an absolute one, citing *Torcaso v. Watkins*, *supra*; *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943), and *Engel v. Vitale*, *supra*. But a review and analysis of all the pertinent decisions, including those cited, clearly rebut this contention. The matter cannot be so simply put.

In *Everson*, *supra*, the Court upheld a school board rule authorizing reimbursement to parents of expenses incurred for the transportation of their children to school on public buses, including reimbursement in some cases for the cost of sending children to Catholic parochial schools. Speaking for the Court, Mr. Justice Black, after expressing the foregoing exposition of the law, held that the wall of separation between Church and State had not been breached within the meaning of that language. The Court noted its reluctance to strike down legislative action within a State's constitutional power "even though it approaches the verge of that power". 330 U.S. at 16.

*McCullum v. Board of Education*, 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 649 (1948), rejected the Illinois "released time" program, where religious classes were conducted on school property by religious instructors during regular school hours. Nevertheless, Mr. Justice Frankfurter, in his concurring opinion, noted that:

"This case, in the light of the *Everson* decision, demonstrates anew that the mere formulation of a relevant Constitutional principle is the beginning of

the solution of a problem, not its answer. This is so because the meaning of a spacious conception like that of the separation of Church from State is unfolded as appeal is made to the principle from case to case. We are all agreed that the First and the Fourteenth Amendments have a secular reach far more penetrating in the conduct of Government than merely to forbid an 'established church'. But agreement, in the abstract, that the First Amendment was designed to erect a 'wall of separation between church and State,' does not preclude a clash of views as to what the wall separates. Involved is not only the Constitutional principle but the implications of judicial review in its enforcement. Accommodation of legislative freedom and Constitutional limitations upon that freedom cannot be achieved by a mere phrase." 333 U.S. at 212-213.

Again, at 333 U.S. 225, he stated that:

"Of course, 'released time' as a generalized conception, undefined by differentiating particularities, is not an issue for Constitutional adjudication. Local programs differ from each other in many and crucial respects. Some 'released time' classes are under separate denominational auspices, others are conducted jointly by several denominations, often embracing all the religious affiliations of a community. Some classes in religion teach a limited sectarianism; others emphasize democracy, unity and spiritual values not anchored in a particular creed. Insofar as these are manifestations merely of the free exercise of religion, they are quite outside the scope of judicial concern, except insofar as the Court may be called upon to protect the right of religious freedom. It is only when challenge is made to the share that the public schools have in the execution of a particular 'released time' program that close judicial scrutiny is demanded of the *exact relation between the religious instruction and the public educational system in the specific situation before the Court.*" (Emphasis added.)

This latter phrase approaches what we believe to be the proper judicial test, in its reference to the exact degree of interrelationship between the religious activity in question on the one hand and the public educational system on the other.

The same consideration is found again in *Zorach v. Clauson*, 343 U.S. 306, 72 S. Ct. 679, 96 L. Ed. 954 (1952), where the Court upheld the constitutionality of New York City's released time program, which permitted the release of students from public schools during the school day to attend classes in religious instruction at religious centers not on school property. In analyzing the scope of the First Amendment prohibition, the Court noted, through Mr. Justice Douglas (343 U.S. at 312):

"The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter."

The essence of the issue is then most aptly stated, at 343 U.S. 314:

"The constitutional standard is the separation of Church and State. *The problem, like many problems in constitutional law, is one of degree.*" (Emphasis added.)

That this is undoubtedly the case is reflected not only in the landmark decisions in this area (*Everson* and *Engel*; *McCullum* and *Zorach*), but in numerous other cases, as noted by Mr. Justice Reed in his dissenting opinion in *McCullum v. Board of Education*, *supra* (333 U.S. at 249):

This explains the well-known fact that all churches receive 'aid' from government in the form of freedom from taxation. The *Everson* decision itself

justified the transportation of children to church schools by New Jersey for safety reasons. It accords with *Cochran v. Louisiana State Board of Education*, 281 U.S. 370, where this Court upheld a free textbook statute of Louisiana against a charge that it aided private schools on the ground that the books were for the education of the children, not to aid religious schools. Likewise the National School Lunch Act aids all school children attending tax-exempt schools. In *Bradfield v. Roberts*, 175 U.S. 291, this Court held proper the payment of money by the Federal Government to build an addition to a hospital, chartered by individuals who were members of a Roman Catholic sisterhood, and operated under the auspices of the Roman Catholic Church. This was done over the objection that it aided the establishment of religion. While obviously in these instances the respective churches, in a certain sense, were aided, this Court has never held that such 'aid' was in violation of the First or Fourteenth Amendments."

Just as the *Everson* decision found no unconstitutional encroachment in a matter of general welfare legislation, the Court in *McGowan v. State of Maryland*, 366 U.S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961), similarly found no objectionable infringement in a legislative exercise of the police power.

It is respectfully submitted that the "absolute prohibition" of the Establishment Clause in actuality presents more of a graduated spectrum or range, than a fixed finite wall. The problem, as Mr. Justice Douglas notes in *Zorach*, is one of degree. The question in each case is where to draw the line — or, if you will, where to put the "wall". The considerations underlying such application of the dividing line between permitted state accommodation and proscribed impingement or encroachment, have been and



must continue to be applied anew in each fact situation as it arises.

(b) *The Nature of the Opening Exercises  
In Question*

Before the principles and protections afforded by the Establishment Clause may be applied to the challenged exercises, the nature and purpose of those exercises must be examined in some detail.

The Rule adopted by the Board of School Commissioners of Baltimore City provides, in effect, for the reading of a portion of the Bible and/or the recital of the Lord's Prayer, without comment, and makes provision for excuse. The crux of the Petitioners' contention is set forth best in the dissenting opinion below (*Murray v. Curlett*, 228 Md. 239, at 257-258):

"There seems to be no substantial room for dispute that the reading of passages from the Bible and the recital of the Lord's Prayer are Christian religious exercises. This being so, the inclusion of such a reading or recital in the opening exercises of the public schools seems plainly to favor one religion and to do so against other religions and against non-believers in any religion."

We do not agree. We do not think that the use of the Lord's Prayer or the reading of the Bible to commence the school day can be characterized in so clear or simple a fashion. Rather, it is submitted that these exercises have assumed a role, through long usage and tradition, of a far different and more complex nature.

Of course, as recognized in *Engel*, a prayer by its very nature is a religious activity. But this factor alone is not determinative of the issue at hand. It was not determinative in *Everson* or *Zorach*, or in the other decisions noted

above. Nor was it determinative in *Engel* (as will be pursued at greater length, below).

Rather, the precise nature of the religious activity must be analyzed in considerable detail in each case to determine whether it has crossed the dividing line which marks off the area of permitted accommodation from that of proscribed encroachment, in the graduated spectrum of factual situations reflecting Church-State contact.

It is respectfully submitted that the opening exercises in question must be categorized as coming within the permitted range — the constitutional side of the line. These exercises, through long usage and tradition, have far transcended and outgrown their purely religious origins. They are not used in the school system as a religious rite, whether denominational or non-denominational. To the contrary, through long usage and gradual evolution of purpose, they have taken their place in our school system as a traditional mode of a sobering and morally beneficial exercise with which to begin the school day. They are used here, as they are used in opening the sessions of legislatures and courts, as a way to commence the day's events with a few moments of an inspirational moral uplifting.

It is thus our contention that the dominant purpose and effect of these exercises is not religious instruction, as in *McCullum*, nor the conduct of religious services, as in a place of worship. To the contrary, the pervading purpose and objective in such use of the Lord's Prayer and the Bible is the utilization of a source material for inculcation of moral and ethical precepts.

While at first inspection, these materials evidence and reflect their religious content and origin, a closer examination and analysis reveal that the elements of religiousness

play only a minute part in the underlying and motivating role of the opening exercises. It is the *inspirational appeal of religion* which is utilized here, not the teachings or dogma of any particular religion, or even that of religion in general. If there be any "aid" to religion here at all (and we contend there is not), it is extremely minimal in nature and degree.

The Bible is not merely a great religious work of a particular sect or religion, it is also a treasury of fundamental moral and ethical values. The Lord's Prayer is not merely a prayer to be recited in church as part of a religious service. In our society, the Lord's Prayer has, over the centuries, attained a far greater height and meaning. It has transcended its sectarian origin, and indeed its purely religious roots, and stands with the Bible as a great moral and inspirational work of high value.

Like the "Sunday blue laws" in *McGowan*, these opening exercises have assumed a stature in our educational system markedly and wholly apart from their religious beginnings. As stated by the New Jersey Court in *Doremus v. Board of Education*, 5 N.J. 435, 75 A. 2d 880, 888 (1950), appeal dismissed 342 U.S. 429, 72 S. Ct. 394, 96 L. Ed. 475 (1952):

"No rites, no ceremony, no doctrinal teaching; just a brief moment with eternity."

The fact that the concept here presented may be a complex and elusive one does not detract from its essential validity. Mr. Justice Frankfurter, dissenting in *West Virginia State Board of Education v. Barnette*, *supra*, touched upon the subject of bible reading in the public schools. He noted, *inter alia*, with apparent approval, that (319 U.S. at 659):

"... The requirement of Bible-reading has been justified by various state courts as an appropriate

means of inculcating ethical precepts . . ." (Emphasis added.)

In a letter to the Editor of the Daily Record, Baltimore, Maryland (set forth in full in the Appendix to this brief), Dr. George B. Brain, Superintendent of the Baltimore Public Schools, commented on the extremely salutary effect which the opening exercises as currently practiced in the Baltimore City Public Schools have upon the attitudes of the students from a disciplinary and behavioral standpoint.

The public school system bears a heavy burden in discharging its responsibilities in the training, development and education of each successive generation. The right to utilize the traditional mainsprings of moral and inspirational value here in question, should not be denied to the State legislative power. Leaving aside for the moment issues of coercion or compulsion upon the individual who may exercise his right to be excused, we respectfully submit that there is no sufficient encroachment or impingement in the instant case to abridge the Establishment Clause.

(c) *The Establishment Clause Principles as Applied to the Opening Exercises In Question.*

The application of the principles enunciated by this Court to the challenged exercises here in issue clearly reflect that there is no abridgement of the Church-State "barrier".

The oft-quoted *Everson* dictum, *supra*, is not abridged. The traditional use of the challenged opening exercises has not "set up a church", nor has it operated so as to "aid one religion, aid all religions, or prefer one religion over another". To the contrary, as noted above, the dominant

purpose and effect of these exercises is not to aid or foster a religion, or religiousness in general, but rather to utilize these works which have transcended their religious origins, so as to inculcate moral and ethical precepts of a sobering and inspirational nature. The public school does not aid religion here.

Furthermore, this is not the type of close Church-State workings which the Court found objectionable in *McCullum*. There, actual instruction in religious dogma took place on public school property. Numerous sectarian groups were given the aid of the State's public school system and machinery. The instant case does not begin to approach such an intimate degree of Church-State interrelationship. There are no religious instructors on school property here. This is not the teaching of a sectarian religion in a public school on school time or at public expense. Clearly, the Establishment Clause does not contemplate the prohibition of a use of religious materials for a purpose and goal which is fundamentally non-religious and non-sectarian in nature.

Employing the same reasoning, we contend that there is no infraction of the view that:

"Government may not . . . blend secular and sectarian education . . ." *Zorach v. Clauson*, *supra*, 343 U.S. at 314.

Furthermore, to the extent the *McCullum* decision and related cases were influenced by the use of tax supported facilities for prohibited purposes, such a factor is *de minimis* in the case at hand. It plainly cannot be maintained here "that the brief interruption in the day's schooling caused by compliance with the statute adds cost to the school expenses or varies by more than an incomputable

scintilla, the economy of the day's work. *Doremus v. Board of Education*, *supra*, 75 A. 2d at 882.

Despite the Petitioners' contention, we maintain that *Torcaso v. Watkins*, *supra*, poses no problem here with respect to the prohibitions of the Establishment Clause. *Torcaso*, like *Barnette*, presented questions related to matters of compulsion or coercion, which are discussed and reviewed, *infra*, in an analysis of the Free Exercise Clause.

It is, of course, the case of *Engel v. Vitale*, 470 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962), which presents the most directly applicable Establishment problems bearing upon the case at bar. Putting aside for the moment those aspects of that decision which deal with matters of compulsion or coercion, we respectfully submit that *Engel* held only that "... it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government." 370 U.S. at 425. (Emphasis added.)

The Court's opinion thus reflects that it is the degree of Church-State impingement which is the decisive factor. In *Engel*, the hand of the state was extended directly into the religious sphere via composition of an official prayer. It is the element of official composition which breached the barrier. This governing thought is shown again in the *Engel* opinion when the Court states, at 435:

... each separate government in this country should stay out of the business of writing or sanctioning official prayers.

The Court thus reflected its concern with and disapproval of that degree of Church-State contact which would permit a state official either to compose a prayer for such prohibited use, or to select a prayer composed by another for the same purpose. We submit that when the Court in *Engel* referred to "writing or sanctioning official prayers"



it was concerned with and was directing its attention to the sort of direct state intervention presented when a state official either composes, or selects from the works of another, a modern prayer.

Plainly, had the Court held otherwise, any governmental agency would have been free to compose or select a prayer suited to its own taste and views — a practice which by nature would have been always susceptible to slanting or emphasis in a sectarian, racial or denominational fashion. This Court would have then found itself in the position of a board of censors for every prayer which might be officially composed or selected. (Compare Mr. Justice Frankfurter's concurring opinion in *McCullum*, 333 U.S. at 212-213, as quoted *supra*, pp. 8-9.)

The Court in *Engel* summarized its position thus (370 U.S. at 430):

"Under that Amendment's prohibition against governmental establishment of religion, as reinforced by the provisions of the Fourteenth Amendment, government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity."

We respectfully maintain that none of the foregoing considerations are presented in the case at bar. Nowhere do we find the State's hand in the composition of a prayer. The School Board's designation of the use of the Lord's Prayer can hardly be compared with the composition or selection of the Regents' Prayer. If the selection of the Lord's Prayer constitutes "sanctioning" within the meaning of the Court's opinion, it cannot in any case be construed as the sanctioning of an "official prayer". As explored in

detail above, while the use of the Lord's Prayer or the Bible is undeniably the use of materials which are religious in nature by dint of their origin and framework, they are not used in our opening exercises as an "official prayer", but rather as a vehicle whereby the desired level of moral, ethical and inspirational uplifting can be attained, and with which our children may properly begin the sober work of the school day.

The Regents' prayer, on the other hand, could not possibly hope to achieve the status of the Lord's Prayer or the Bible. It did not — it could not — escape its limitations as an unadorned religious exercise, and thus could not avoid conflict with the Church-State barrier imposed by the Establishment Clause. It remained, by its very nature, merely a prayer — the handiwork of state officials endeavoring to compose a non-denominational, non-sectarian supplication for the blessings of the Almighty. On this account, it was stricken:

"There can be no doubt that New York's state prayer program officially establishes the religious beliefs embodied in the Regents' prayer. The respondents' argument to the contrary, which is largely based upon the contention that the Regents' prayer is 'non-denominational' and the fact that the program, as modified and approved by state courts, does not require all pupils to recite the prayer but permits those who wish to do so to remain silent or be excused from the room, ignores the essential nature of the program's constitutional defects. Neither the fact that the prayer may be denominationally neutral, nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause, of the First Amendment, both of which are operative against the States by virtue of the Fourteenth Amendment." 370 U.S. at 430.

On the other hand, the Lord's Prayer and the Bible stand on a far different footing. In our view, their use in the schools in opening exercises does not "officially establish the religious beliefs" embodied therein. Unlike the Regents' prayer, they represent far more than mere religious exercise. Their passages have come to represent, over the centuries, perhaps the finest distillations of moral values for the uplifting and inspirational edification of young and old alike. The manner in which they are used in the challenged exercises far surpasses that of a mere "solemn avowal of divine faith and supplication for the blessings of the Almighty."

There is a majestic quality to the Lord's Prayer and to the Bible. Whether child or adult, atheist or agnostic, Buddhist or Jew, there is an almost indefinable quality of inspirational appeal inherent in these works which captures the spirit and imagination. Their works rarely fail to produce an effect of wonder; often of awe. There is a sobering effect, which is comforting, and yet at the same time, inspiring.

It is the sum total of these effects which is sought to be utilized in the challenged opening exercises — not a "governmentally sponsored religious activity", not an "official prayer", but a utilization of the fundamental moral value implicit in these materials which, aided by their rich heritage and tradition, serve to play a role which far surpasses the basic elements of religiousness from which the works themselves stem.

Is the use of these established mainsprings of moral and ethical value to be denied to our public educators? The task of educating, training and developing our young is extremely difficult in this modern day and age. Our public school system should not be deprived of the ability to be-

gin the school day with a valuable, well-established and traditional adjunct in the development in our youth of those qualities of character and behavior which rank high in our society.

*The elements of religiousness implicit in the present-day use of these materials in the schools' opening exercises, are not of such a nature, in quality or in quantity, in purpose or in effect, as to produce an abridgement of the principles of the Establishment Clause.*

It is respectfully submitted that the opening exercises in issue have not attained such a degree of Church-State contact to be deemed a violation of the Establishment Clause.

## POINT II.

### **The Protections Afforded Freedom of Belief by the Free Exercise Clause of the First Amendment Are Not Abridged by the Opening Exercises In Question.**

The Free Exercise Clause imposes prohibitions and affords protections of a sort different from those of the Establishment Clause. If the latter defines and limits the extent or degree of constitutionally permitted inter-relationship between Church and State, the former may be said to deal with the right of the individual to be free from elements of influence, coercion and compulsion in his choice of belief and worship.

"Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not." *Engel v. Vitale*, 370 U.S. at 430.

In short, under the broad interpretation to be accorded the Establishment Clause, its protections are abridged whenever there is an "establishment" in the broad sense, regardless of the presence or absence of elements of coercion or compulsion upon the "nonobserving individual". The Establishment Clause thus comes "first", in that if it is abridged, there is no need to go further to determine whether or not the individual's freedom of belief or religion has been violated.

We submit that the considerations underlying the protections afforded by these two clauses must be kept separate and apart to permit proper analysis. Otherwise, the interplay between these conflicting and yet complementing constitutional spheres, can, in our view, easily lead to an oversimplification of the issues presented, or worse, to an overlay of one set of principles upon another which may tend to produce an erroneous result.

The Free Exercise Clause extends its protections beyond the usual First Amendment liberties of belief and worship, and guards against several types or forms of compulsion or coercion which are alleged to bear upon the instant case. Again, we submit that each must be subjected to separate analysis.

(a) *The so-called pressures generated by the school machinery.*

The first type of coercion or compulsion is that which survived challenge in *Zorach*, but was deemed an unconstitutional abridgement of the Free Exercise Clause in *McCollum*. Thus, in *Zorach*, 343 U.S. at §11:

"There is a suggestion that the system involves the use of coercion to get public school students into religious classrooms. There is no evidence in the record before us that supports that conclusion. The present

record indeed tells us that the school authorities are neutral in this regard and do no more than release students whose parents so request. If in fact coercion were used, if it were established that any one or more teachers were using their office to persuade or force students to take the religious instruction, a wholly different case would be presented."

And in Mr. Justice Frankfurter's concurring opinion in *McCullum*, 333 U.S. at 227:

The Champaign arrangement thus presents powerful elements of inherent pressure by the school system in the interest of religious sects. . . . The law of imitation operates, and nonconformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend.

In short, the Court in the above cases was faced with elements of compulsion which involved the use of school system facilities to channel or influence pupils toward the activity in question — a type of subtle pressure generated by the very workings of the educational machinery. In *McCullum*, this form of coercion or compulsion undoubtedly played a significant part in the decision. In *Zorach*, the Court found no such elements of coercion (but see Mr. Justice Black's dissenting opinion).

It is our contention that this form or type of compulsion, if any there be, goes more to the Establishment Clause than to the Free Exercise Clause. The essence of the *McCullum* brand of compulsion is that the State machinery is utilized to encourage or channel students toward a program which is prohibited by the Establishment Clause. In this manner, it begs the question.

That is, if the challenged activity offends the Church-State barrier imposed by the Establishment Clause, as in *McCullum*, then obviously, efforts which direct or apply



pressure upon the pupils to participate in this activity are equally offensive. But, if the requirements of the Establishment Clause have been satisfied, if the prohibited degree of Church-State inter-workings has not been attained, then any such means of so-called compulsion operates only to encourage or direct a pupil to a *constitutionally permitted activity*. Such influences must therefore be constitutional themselves. The pressures upon the child, if any be found to exist, are no more objectionable than the pressures of the compulsory school attendance requirement itself.

We accordingly maintain that if the challenged exercises have survived the tests and prohibitions of the Establishment Clause, then such factors of compulsion cannot serve to abridge the Free Exercise Clause. It is only when the activity in question is a prohibited one that the safeguards of the Free Exercise Clause are equally offended by elements of pressure and coercion toward the already offending activity. And in such instances, the added abridgement of the Free Exercise Clause is unnecessary to the result.

The one test must be separated from the other. If an activity survives the first, it must inevitably survive the other.

It is our contention that the opening exercises conducted in the Baltimore public schools do not offend the prohibitions and safeguards of the Establishment Clause. We have submitted that these exercises are utilized as an inspirational device to inculcate precepts of moral and ethical value in a salutary atmosphere of sobriety. Thus, they transcend their religious origins, and do not embrace sufficient elements of religiousness to come within the prohibited degree of Church-State inter-relationship. If this

be so, as we steadfastly maintain it is, then any elements of compulsion inherent in the school machinery which may influence the student to attend the opening exercises must be equally free of constitutional taint. If the challenged activity itself is a constitutional one, efforts to influence or persuade the child to attend are no more objectionable than like efforts to induce a child to attend a class in mathematics or music or Greek.

We maintain first that, as in *Zorach*, this form or brand of alleged compulsion is non-existent in the case at hand. It is not established, other than perhaps by way of conclusory allegation, that "any one or more teachers . . . (are) . . . using their office to persuade or force students . . ." *Zorach v. Claiborn*, 343 U.S. 306, at 311. But even if it were clearly shown that the workings of the school machinery operated to produce such elements of pressure upon students to attend the exercises in question, they would nevertheless remain unobjectionable. Any such pressure exacted, of the type or form here in question, would be toward an activity deemed permissible by all of the principles and tenets of the Establishment Clause.

(b) *The Barnette brand of compulsion*

There is, however, another form of compulsion or coercion which does constitute an abridgement of the Free Exercise Clause, even though the program or activity in question may not encroach upon the Church-State barrier erected by the Establishment Clause. The case of *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943), provides an excellent illustration. The Court there held unconstitutional the compulsory element of a flag salute and pledge, on the ground that it invaded the "sphere of intellect and spirit which it is the purpose of the First Amendment to our

Constitution to reserve from all official control". 319 U.S. 624, at 642. The decision did not proceed solely upon grounds related to the infringement of the religious beliefs of the Jehovah's Witnesses:

"Nor does the issue, as we see it, turn on one's possession of particular religious views or the sincerity with which they are held. While religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual." 319 U.S. at 634-635.

Obviously, the flag salute exercise did not run afoul of the Establishment Clause; the Church-State barrier clearly was not in issue. Rather, the exercise was held unconstitutional as an abridgement of the freedom of belief guaranteed by the Free Exercise Clause — despite the fact that no establishment problem was presented. In short, the practice was held to offend the sensibilities and scruples — religious or otherwise — of the pupils upon whom the coercion operated. It was thus the *compulsory* nature of the obligation which caused its downfall. The refusal of the state authorities to excuse or exempt those who protested rendered this brand of coercion or compulsion unconstitutional. Such lack of provision for excuse or exemption is the key element in this form of compulsion. Had the state granted such a right, the practice would have been upheld. (In fact, this is the very result of the Court's decision.)

In this area of compulsion, then, where the activity involved does not abridge the Establishment Clause, but is challenged only on Free Exercise grounds, the right to be excused from the activity is sufficient protection. The only unconstitutional aspect which may exist is that of the

compulsory requirement, and this is obviously remedied by the granting of a right of exemption.

Therefore, we submit, it continues to be the case that if the challenged activity survives the tests imposed by the Establishment Clause, it will also survive the requisites of the Free Exercise Clause — so long as the right to be excused is provided.

The form or type of compulsion present in *Barnette* is non-existent in the instant case. Like the first classification of compulsion (the *McCollum* brand, above), it must be rejected as a factor here.

(c) *The Torcaso brand of compulsion*

*Torcaso v. Watkins*, 367 U.S. 488, 81 S. Ct. 1680, 6 L. Ed. 2d 982 (1961), held unconstitutional the prerequisite of a declaration of belief in God as a test for public office. While this decision may be thought by some to be predicated in part on Establishment principles, the true criteria in the case would appear to be the violation of the protections afforded by the Free Exercise Clause:

"This Maryland religious test for public office unconstitutionally invades the appellant's freedom of belief and religion and therefore cannot be enforced against him." *Id.*, 367 U.S. at 496.

The *Torcaso* brand of compulsion, then, is a very direct one. The State in effect directs: "Say that you believe as the State says you should believe, or you will be deprived of the reward". The compulsion to conform in belief is plain and evident.

The *Torcaso* brand of compulsion is not present in the instant case. The opening exercises in question do not invade "the appellant's freedom of belief and religion". The *Torcaso* form of compulsion is directly related to the at-

tainment or deprivation of some goal or incentive. Torcaso imposed a religious oath as a requirement to state office. The present case, on the other hand, involves an exercise which transcends mere religiousness and does not make it a requirement to any set privilege or goal. The State here does not say: "Attend and participate in this practice, or you will be deprived of a given privilege". The student is not required to attend, or if he does attend, to participate. If he absents himself, he forfeits nothing.

Accordingly, it is respectfully submitted that Torcaso is clearly distinguishable from the present case, and its brand of compulsion has no application here.

(d) *Disapproval and "loss of caste": professing a belief or disbelief.*

Petitioners nevertheless maintain that the right to be excused from the opening exercises is an inadequate safeguard. They invoke in support of that contention still another category of alleged compulsion. Their contentions here take two closely related forms:

(1) The affirmative action which must be taken by or on behalf of a student to absent himself from the opening exercises, is equivalent to requiring him to "profess a belief or disbelief in religion".

(2) Subtle or outspoken disapproval from teachers and other students, as a result of the student having elected to absent himself, operates as a form of coercion to conform.

It is submitted that these closely related factors must be analyzed separately and apart from the other forms of compulsion reviewed above, lest the respective elements become improperly entwined and confused:

"The coercive or compulsive power of the State is exercised at least to the extent of requiring pupils to attend school and it requires affirmative action to exempt them from participation in these religious exercises.

\* \* \* \* \*

"Despite the provisions for excuse from attending these religious exercises, two further questions relating to coercion . . . still remain. One is whether or not there is coercion upon the individual student by reason of his incurring suspicions and losing caste with his fellows, as alleged in the petition. The other is whether or not there is compulsion upon the student or his parent requesting that he be excused, or upon both, to profess disbelief in any religion." Chief Judge Brune, dissenting below, 228 Md. at 258-259.

It is submitted that when each element of such alleged coercion or compulsion is sifted out of the composite whole in which it is found, and exposed to separate analysis, it will be seen that no constitutional safeguards have been abridged.

Obviously, as argued, a student cannot be excused from the activity in question without affirmative action. Whether he need bring a note from home, or need merely walk out of the room, he obviously must do something. But this does not mean that the right to be excused affords inadequate protection. As analyzed above in our discussion of the *Barnette* and *Torcaso* forms of compulsion, the proper role of the privilege to be excused is as an escape valve for those whose scruples or beliefs would be offended by an activity which is deemed permissible by the Establishment Clause. In this role and for this purpose, it is sufficient.

It might even be argued here with considerable vigor that if the nature of the activity in question is a permissible



one from the standpoint of the Establishment Clause, then there would appear little reason why participation or at least attendance by everyone could not be required. See, for example, Mr. Justice Frankfurter's dissenting opinion in *Barnette*, *supra*.

However, we live in an age in which responsible government is acutely aware of and sensitive to the conscientious scruples and sensibilities of minority groups — and properly so. It is for this reason that the Court, in *Barnette*, even where the activity in question was a proper one to be conducted, held unconstitutional the attempts to impose participation upon those who felt their freedom of belief was thus invaded.

For this reason, the Rule in issue grants a right to be excused and to be exempted from what we maintain is a permissible activity. Any individual whose feelings, scruples, or other tenets of belief might be offended by the practice in question, may be spared such experience, if he so chooses. Such an escape valve is sufficient and adequate.

This far, the State goes. This much protection is afforded. No more should be required. If the principles of the Establishment Clause are satisfied, the Free Exercise Clause may not and should not be invoked so as to spare the dissenter's sensibilities by eliminating the activity in question.

Our point here may be put thusly: the dissenter, if offended, can walk away. But he cannot ask that everyone else walk away from him. By way of analogy, if the noise and pageantry of a parade is offensive, one may refuse to watch or hear it. But he cannot rightfully petition to have the parade cancelled.

Petitioners further contend that the practice in question discriminates against them. But in reality the relief they

ask would, in fact, create a kind of "reverse discrimination". If, as we maintain, those persons whose scruples or sensibilities may be offended by the exercises are protected in their constitutional privileges by virtue of the right to be excused, then it inevitably must follow that they, in turn, have no right to go one step further and convert their right of protection into an affirmative weapon. This would convert what was intended as a shield into a sword.

We agree, of course, that the First Amendment protects the non-believer with the same force as it protects the believer. But we submit that it was never intended that such right of protection be extended to grant a preference to either, and this is precisely what Petitioners ask.

Mr. Justice Douglas expressed this concept pointedly in his dissenting opinion in *McGowan v. Maryland*, 366 U.S. 420, 563, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961), in defining the meaning of the command of the First Amendment:

"... This necessarily means, *first*, that the dogma, creed, scruples, or practices of no religious group or sect are to be preferred over those of any others; *second*, that no one shall be interfered with by government for practicing the religion of his choice; *third*, that the State may not require anyone to practice a religion or even any religion; and *fourth*, that the State cannot compel one so to conduct himself as not to offend the religious scruples of another." (Emphasis added.)

As demonstrated above, the Respondents respectfully submit that they have met the first three tests. They now urge that the Petitioners be held to meet the fourth.

Petitioners urge that subtle but coercive pressures will be generated by the disapproval of teachers and pupils. The allegation is purely a conclusive one; there is no aver-

ment substantiating in any manner why or how such disapproval will take place. We also note that Mr. Justice Douglas in his concurring opinion in *Engel* found no such element of compulsion or coercion present.

But even if the issue be assumed correct, *arguendo*, the answer is plainly *not* to abolish the opening exercises. The disapproval of others is always the risk and burden of the nonconformist. He is protected in his choice to dissent by virtue of the right to be excused. But he cannot ask that the source of disapproval or of the alleged "factors of compulsion" be eliminated so that he will be spared the burden of any disapproval. This is, by choice, the dissenter's problem.

As was the case with the Jehovah's Witnesses in *Barnette*, the First Amendment tells the dissenter or nonconformist: Dissent if you wish: no group, no majority, can compel you to do as they do. But, by the same token, you cannot compel any such group to eradicate its practices to suit you. To do so would be to prefer you over those from whom you dissent. Merely because you must take affirmative action to remove yourself from the offending source, or because your exercise of that right may incur the disapproval or dislike of those who do not feel as you do, you cannot ask those others to stop their desired activity.

It makes no difference, we submit, that the acting group or body is the State or School Board (provided always, of course, that the activity does not abridge the Establishment Clause). It also makes no difference that the sensibilities and feelings of children are involved. The First Amendment affords no different protection to the young dissenter than it does to the old. The umbrella of protection against coercive factors (if any such factors be estab-

lished) does not vary with the age of the non-conformist to be protected. Parents who train their children in their own image must realize that their children will have to bear the same possible burden of disapproval as they bear. Adult or child, the conviction of the dissenter must, of necessity, be sufficiently strong to permit him to effectuate his dissent, and to bear the disapproval of others who may disagree with him.

In a country of many and varied groups and beliefs, a person may choose to attend the opening exercises, or to excuse himself, for whatever matter of reason, faith or private creed he chooses to make the grounds of such choice. He need not announce the underlying choice of faith, creed or belief which thus motivates him, unless he so wishes. He need merely absent himself. This is not too much to ask. This is not a requirement to "profess a belief or disbelief". It is simply the step of the individual who chooses to walk away. Petitioners cannot by the use of semantics convert their exercise of a First Amendment privilege into an element of coercion.

By virtue of the same reasoning, we contend there is no merit to Petitioners' argument regarding "religious discrimination" in the classroom. Petitioners invoke the case of *Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 636, 98 L. Ed. 873 (1954), and contend that the opening exercises will generate feelings of inferiority and other harmful social and psychological effects comparable to those caused by racial discrimination, as noted by this Court in the segregation cases.

We reply, firstly, that not only is there no discrimination present, but that the nature of the choice made by those who elect to absent themselves is not, in essence, a religious one. As analyzed at length above, the exercises

themselves transcend their religious origins and framework and are used for a purpose and effect far surpassing mere religiousness. Furthermore, as also noted above, one may choose to absent himself for whatever reason or motive of faith, creed or belief he chooses, religious or otherwise, expressed or unexpressed.

Secondly, all students are treated equally in their right to attend or not to attend the exercises. The right to be excused is the exercise of a valuable privilege accorded by the protections of the First Amendment; it is not a divisive means whereby the State discriminates among groups. No justifiable comparison can be made here between the Negro children who had no choice but to submit to segregated and inherently unequal school facilities, and the children in our public schools who may by choice be excused from opening exercises.

It is accordingly submitted that equal protection clause considerations are wholly inapplicable here.

In summary, then, Respondents respectfully submit that there is no element of coercion or compulsion which gives rise to an abridgment of the protections afforded freedom of belief by the Free Exercise Clause of the First Amendment.

### POINT III.

**A Decision Prohibiting the Reading of the Bible and the Recital of the Lord's Prayer In Opening Exercises in the Public Schools Will Lead Inevitably to the Total Elimination of All Forms of Church-State Contact, Including References To God, From All Public Works and Institutions.**

As is aptly noted in Petitioners' brief, much concern has been evidenced in many quarters regarding the ultimate consequences of the Court's decision in *Engel v.*



*Vitale, supra*, ranging from fear for the safety of ceremonial invocations in courts, state legislatures and Congress, to alarm regarding the use of the motto "In God We Trust" on our coins and currency.

Attempts have been made to allay much of the early misunderstanding which followed that decision. And yet it is the Respondents' earnest belief and contention that if this Court fails to find that the challenged opening exercises are within the permitted range of Church-State interrelationship, the inevitable consequence will be continued litigation demanding and leading to the elimination from our public works and institutions of all forms of Church-State contact which bear the slightest connotations of religiousness.

The range of instances and cases which can be embraced by an extension of the Church-State barrier is extremely broad:

"The practices of the federal government offer many examples of this kind of aid by the state to religion. The Congress of the United States has a chaplain for each House who daily invokes divine blessings and guidance for the proceedings. The armed forces have commissioned chaplains from early days. They conduct the public services in accordance with the liturgical requirements of their respective faiths, ashore and afloat, employing for the purpose property belonging to the United States and dedicated to the services of religion. Under the Servicemen's Readjustment Act of 1944, eligible veterans may receive training at government expense for the ministry in denominational schools." Mr. Justice Reed, dissenting in *McCullum v. Board of Education, supra*, 333 U.S. at 253-254.

Perhaps the most inclusive list of illustrations is set forth in footnote 1 to Mr. Justice Douglas' concurring opinion in *Engel v. Vitale, supra*, 370 U.S. at 437:



"1. There are many "aids" to religion in this country at all levels of government. To mention but a few at the federal level, one might begin by observing that the very First Congress which wrote the First Amendment provided for chaplains in both Houses and in the armed services. There is compulsory chapel at the service academies, and religious services are held in federal hospitals and prisons. The President issues religious proclamations. The Bible is used for the administration of oaths. N.Y.A. and W.P.A. funds were available to parochial schools during the depression. Veterans receiving money under the "G.I." Bill of 1944 could attend denominational schools, to which payments were made directly by the government. During World War II, federal money was contributed to denominational schools for the training of nurses. The benefits of the National School Lunch Act are available to students in private as well as public schools. The Hospital Survey and Construction Act of 1946 specifically made money available to non-public hospitals. The slogan "In God We Trust" is used by the Treasury Department, and Congress recently added God to the pledge of allegiance. There is Bible-reading in the schools of the District of Columbia, and religious instruction is given in the District's National Training School for Boys. Religious organizations are exempt from the federal income tax and are granted postal privileges. Up to defined limits — 15 per cent of the adjusted gross income of individuals and 5 per cent of the net income of corporations — contributions to religious organizations are deductible for federal income tax purposes. There are limits to the deductibility of gifts and bequests to religious institutions made under the federal gift and estate tax laws. This list of federal "aids" could easily be expanded, and of course there is a long list in each state." Fellman, *the Limits of Freedom* (1959), pp. 40-41."

A more familiar expression of the extremes here involved is set forth in the lower court opinion in the case at bar by Judge Prendergast (at R. 17):

"Any reference to the Declaration of Independence would be prohibited because it concludes with the historic words of the signers. \* \* \* with a firm reliance on the protection of Divine Providence we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.' Any mention of Lincoln's Gettysburg Address would be anathema because in it the Great Emancipator prayed that 'this nation, under God, shall have a new birth of Freedom.' It is even possible that United States currency would not be accepted in school cafeterias because every bill and coin contains the familiar inscription, IN GOD WE TRUST."

In setting forth once again the extended list of illustrations which is pertinent to this point, we are not unaware of the numerous occasions upon which this approach has been utilized, nor of the many responsible rebuttals which can be offered to the contentions thus posed. But:

"I am not borrowing trouble by adumbrating these issues nor am I parading horrible examples of the consequences of today's decision. I am aware that we must decide the case before us and not some other case. But that does not mean that a case is dissociated from the past and unrelated to the future. We must decide this case with due regard for what went before and no less regard for what may come after." Mr. Justice Frankfurter, dissenting in *West Virginia State Board of Education v. Barnette*, *supra*, 319 U.S. at 660-661.

Nor are we unaware that in *Engel* at footnote 21 of the majority opinion, the Court endeavored to anticipate and to meet, to some extent, the force of the "parade of horrors," by saying (370 U.S. at 435):

"There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which

contain references to the Deity or by singing officially espoused anthems which include the composer's profession of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance."

However, we respectfully maintain that the very serious considerations presented by the foregoing categorization, of possible consequences cannot be lightly or easily dismissed. In the range or spectrum of varying factual situations and instances, it is urged that the line be drawn *here*, and not beyond. Beyond the Lord's Prayer and Bible reading, if prohibited, the distinctions become extremely tenuous. If these opening exercises are deemed to bear sufficient elements of religiousness to fall within the proscribed Church-State area, it will become increasingly difficult to maintain that any other form of Church-State contact does not bear equally sufficient aspects of religiousness. Distinctions can undoubtedly be made, but the force and logic behind them become seriously hampered and weakened the further one progresses along the span or range of possible instances. Each time the Court condemns a form of activity bearing somewhat less "quanta" of religiousness than its predecessor, it becomes that much more difficult not to encompass with the same reasoning the next activity on the scale of religiousness.

We note with interest Justice Douglas' concurring opinion in *Engel*. After setting forth the foregoing quotation from *Fellman* at footnote 1 of his opinion, he then proceeds to say: "Nevertheless, I think it is an unconstitutional undertaking whatever form it takes". 370 U.S. at 437. We contrast this statement with many of the expressions in *Zorach*.

As can thus readily be seen, it is not difficult to embrace all forms of Church-State aid or contact within whatever rationale or approach is utilized in the case at hand. Regardless of present intentions concerning distinctions which can be made at some future date, the fact which cannot be disregarded is that views may change and become altered; the shifting composition of views which today may draw the line at one indicated point, may tomorrow extend that line to encompass situations not presently thought to be forbidden.

Irrespective of the analysis and rationale employed in the first two points of our argument, it is for the further and additional reasons advanced here that we urge that the line be drawn at this juncture. The only sure manner in which to halt the gradual and increasing erosion of a vulnerable area, is to firmly mark the dividing line at that point which is the most likely bulwark from a legal and logical standpoint.

Those persons who feel their interests will be advanced by the elimination of religious materials in opening exercises in the public schools will not stop here. Already, proceedings have been instituted before the Commissioner of the State Department of Education of New York, challenging the use in school opening exercises of the Pledge of Allegiance to the Flag, the final stanza of the hymn "America", and the Declaration of Independence. *In the Matter of Jurgen Worthing, et al. v. Levittown School District*, filed September 25, 1962. Suffice it to say that the challenges are made on familiar grounds.

The door has been opened. Today, "patriotic or ceremonial occasions" may be said to bear little resemblance to the religious exercise involved in *Engel*, but as each successive case is presented, one step at a time, the re-

semblance becomes greater. Perspective on a graduated scale of values can easily become foreshortened.

Even classes in comparative religion would be suspect. Emphasis by the individual teacher or professor can be placed on the virtues of one religion to the exclusion or detriment of another. Will this Court be the watchdog over every form and expression of religiousness in our public life?

If sectarianism or religiousness is made the test, the same governing principle can be extended to every manifestation of religion and recognition of God in public life. Schools are not the only public institutions, and the non-conformist can find himself offended in any quarter. If Bible reading unconstitutionally offends the Buddhist or the atheist in opening exercises in the public schools, why should not a like result obtain if the same people are equally offended by the invocation which opens sessions of Congress, or by the traditional court crier, or by the reference to the Deity on our currency? Once the opening exercises at bar are condemned, the gap is dangerously narrowed.

The same inspirational appeal which is utilized in the recitation of the Lord's Prayer and readings from the Bible, is evoked in similar fashion by the references to the Deity in our National Anthem, in the Pledge of Allegiance to the Flag, in our historic national documents. If the use of the former is prohibited by reason of their religiousness, then the prohibition of the use of the latter will inevitably follow.

The argument which we make here has been made before. But it assumes renewed significance in view of the increased attempts, after *Engel*, to eradicate every sem-

blance of religiousness in our public life. We commend it anew to the Court's earnest consideration.

#### POINT IV.

**The Traditional Use of the Lord's Prayer and the Bible in Opening Exercises in our Public Schools Has Become Inextricably Entwined With Other Basic Components of our National Heritage.**

After the last court opinion has been cited, and the final legal distinction has been drawn, there still remains a somewhat intangible factor which urges with equal force and dignity that the practice here challenged should not be condemned. Elusive of analysis, this factor would appear to be a delicate combination of those elements of tradition, patriotism, and love of country which have come to be so closely associated with the inspirational appeal evoked and utilized by the religious materials in issue.

Like the references to the Deity in our historic national documents, the use of these materials in opening exercises in the public schools has become a vital and significant thread in the fabric of our rich national heritage, through long and traditional usage. Like the "Sunday closing laws" in *McGowan*, the traditional use of these exercises has surpassed its religious beginnings and has taken its place as a definite part of our national heritage. The thread cannot be easily severed without damage to the whole fabric from which it is drawn.

It has been said that too great a reliance has been placed on the oft-quoted observation by Mr. Justice Douglas in *Zorach* that "We are a religious people . . ." *Id.* 343 U.S. at 313. And yet it cannot be denied that innumerable facets of our public and private life are saturated with religious influences. Our public institutions in Maryland are steeped



in religious traditions. To begin here the slow but inevitable dissection of these influences and traditions from the public sphere can only result in substantial harm to those tenets of our national heritage which have come to mean so much to so many.

We recognize that the argument which we make here may rest upon factors of a somewhat intangible nature when compared to those previously advanced. But the point is an equally real one, and cannot be ignored. It, too, must be weighed in the balance.

### CONCLUSION

The use of the Lord's Prayer and passages from the Bible in opening exercises in the public school does not constitute a violation of either the Establishment Clause or the Free Exercise Clause of the First Amendment to the Constitution, as made applicable to the states by the Fourteenth Amendment. The Respondents respectfully request that the decision of the Court of Appeals of Maryland be affirmed.

Respectfully submitted,

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GEORGE W. BAKER, JR.,  
Deputy City Solicitor.

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Attorneys for Respondents.

## APPENDIX

Letter from Dr. George B. Br n to the Editor of The Daily Record, Baltimore, Md., issue of December 26, 1962

"Editor

THE DAILY RECORD

11-15 East Saratoga Street

Baltimore 3, Maryland

Dear Sir:

In the past few months, our office has received a number of inquiries from the general public, as well as from members of the legal profession, regarding the views of this office as to the values accruing to pupils from the opening exercises conducted each morning in the Baltimore City public school system. These inquiries have undoubtedly been prompted by the interest generated by the litigation currently before the U. S. Supreme Court, attacking the practice in the Baltimore City Schools.

Without regard to the legal issues involved, this office wishes to answer the many inquiries as to our views concerning the value of these exercises in the administration of the public school system. I feel competent to comment from an educational point of view on the values which I observe as accruing to the educational program from the practice.

The School Board rule provides that each school, either collectively or in classes, shall be opened by reading without comment a chapter from the Holy Bible and or the recitation of the Lord's Prayer without comment. In addition, patriotic observances including the Pledge of Allegiance to the Flag and the singing of the Star Spangled Banner are included.

As you no doubt are aware, there has been a general trend in recent years for a great number of children from rural areas to move into the large urban centers throughout America. Oftentimes these newcomers to the city are bewildered and confused by the rules and regulations that

must be observed in a complex urban society. Generally, some of the youth have a tendency to resent any authority, and as a consequence, rebel against rule and regulation.

It has been my candid observation that the opening exercise as practiced in Baltimore City has a salutary effect on the attitudes and behavior of such youth. The acknowledgement of the existence of God as symbolized in the opening exercise establishes a discipline tone which tends to cause each individual pupil to constrain his overt acts and to consequently conform to accepted standards of behavior during his attendance at school. This is especially observable at assembly programs where pupils are congregated together in considerable numbers. While the beneficial effect of the opening exercise may be somewhat ephemeral, it is my candid observation that if no legal question was involved and I was to be asked about the advisability of continuing or discontinuing the practice purely from a disciplinary point of view, I would without question include the practice as a part of the routine opening activities of the school because of its salutary effect.

The attitude which a child brings to his classwork is highly important and it is my strong feeling that a proper attitude for respecting authority is developed through opening exercise activities as currently practiced in the Baltimore City Public Schools.

Very truly yours,

GEORGE B. BRAIN,  
Superintendent."

MOTION FILED - JAN 10 1963

IN THE

# Supreme Court of the United States

October Term, 1962

Nos. 119 and 142

WILLIAM J. MURRAY III, Infant, by MADALYN E. MURRAY, his mother and next friend, and MADALYN E. MURRAY, individually,  
*Petitioners,*

JOHN N. CURLETT, President, SAMUEL EISEN, Mrs. M. RICHMOND FARRING, ELI FRANK, JR., Dr. ROGER HOWELL, HENRY P. IRR, Dr. WILLIAM D. McELROY, Mrs. ELIZABETH MURPHY PHILLIPS, JOHN R. SHERWOOD, individually, and constituting the BOARD OF SCHOOL COMMISSIONERS OF BALTIMORE CITY.

## On Writ of Certiorari to the Court of Appeals of Maryland

SCHOOL DISTRICT OF ABINGTON TOWNSHIP, PENNSYLVANIA, JAMES F. KOEHLER, O. H. ENGLISH, EUGENE STULL and M. EDWARD NORTHAM,  
*Appellants,*

EDWARD LEWIS SCHEMPP, SIDNEY GERBER SCHEMPP, Individually and as Parents and Natural Guardians of ELLORY FRANK SCHEMPP, ROGER WADE SCHEMPP and DONNA KAY SCHEMPP.

## On Appeal from a District Court of Three Judges for the Eastern District of Pennsylvania

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**MOTION OF SYNAGOGUE COUNCIL OF AMERICA  
AND NATIONAL COMMUNITY RELATIONS ADVISORY  
COUNCIL FOR LEAVE TO FILE BRIEF AMICI CURIAE**

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LEO PFEFFER

*Attorney for Synagogue Council of  
America and National Community  
Relations Advisory Council.*

*Amici Curiae*

15 East 84th Street,  
New York 28, New York

IN THE  
**Supreme Court of the United States**

October Term, 1962

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WILLIAM J. MURRAY III, Infant, by MADALYN E. MURRAY, his mother and next friend, and MADALYN E. MURRAY, individually,  
*Petitioners,*

*v.s.*

JOHN N. CURLETT, President, SAMUEL EPSTEIN, MRS. M. RICHMOND FARRING, ELI FRANK, JR., DR. ROGER HOWELL, HENRY P. IRR, DR. WILLIAM D. McELROY, MRS. ELIZABETH MURPHY PHILLIPS, JOHN R. SHERWOOD, individually, and constituting the BOARD OF SCHOOL COMMISSIONERS OF BALTIMORE CITY.

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**MOTION OF SYNAGOGUE COUNCIL OF AMERICA  
AND NATIONAL COMMUNITY RELATIONS ADVISORY  
COUNCIL FOR LEAVE TO FILE BRIEF *AMICI CURIAE***

The undersigned, as counsel for the Synagogue Council of America and the National Community Relations Advisory Council, and on their behalf, respectfully move this

/s/

Court for leave to file a brief *amici curiae* in the above-entitled actions.

The Synagogue Council of America is a co-ordinating body consisting of the organizations representing the three divisions of Jewish religious life: Orthodox, Conservative and Reform. It is composed of:

Central Conference of American Rabbis, representing the Reform rabbinate;

Rabbinical Assembly of America, representing the Conservative rabbinate;

Rabbinical Council of America, representing the Orthodox rabbinate;

Union of American Hebrew Congregations, representing the Reform congregations;

Union of Orthodox Jewish Congregations of America, representing the Orthodox congregations;

United Synagogue of America, representing the Conservative congregations.

The National Community Relations Advisory Council is a co-ordinating body comprised of the following national lay Jewish organizations, in addition to the congregational bodies mentioned above, concerned with American Jewish community relations:

American Jewish Congress;

Jewish Labor Committee;

Jewish War Veterans of the United States;

and 62 local Jewish Community Councils, including all the major cities in the United States.

The organizations affiliated with the Synagogue Council of America and the National Community Relations Ad-



visory Council include in their membership the majority of Americans affiliated with Jewish organizations. We believe, therefore, that in seeking to submit a brief in these cases we speak for the greater part of American Jewry.

The present cases raise questions as to the constitutionality of the practice of daily recitation of portions of the Bible and the Lord's Prayer in public schools.

In No. 119, the petitioners challenge practices followed in the public schools in Baltimore, Maryland, pursuant to the Rules adopted by the Board of School Commissioners of Baltimore City. Article VI, Section 6, of those Rules requires opening exercises each day consisting of "the reading, without comment, of a chapter in the Holy Bible and or the use of the Lord's Prayer." The Rule also provides that a child may be excused from participating in or attending these exercises upon the written request of his parent or guardian. The Maryland Court of Appeals rejected the petitioners' claim that this Rule, and the practices held in accordance therewith in the public schools, were unconstitutional. The case is here on writ of certiorari to review that decision.

In No. 142, the daily reading of the Bible is carried on in accordance with the command of a statute of the Commonwealth of Pennsylvania (24 Purdon's Pa. Stats. Ann. Sec. 15-1516): Under that statute, a child may be excused from the Bible reading ceremony upon the written request of his parent or guardian. The court below, a three-judge statutory District Court, held the statute requiring the reading of the Bible unconstitutional. The case is here on appeal from that decision.

The undersigned organizations support the claim made by the petitioners in No. 119 and the appellees in No. 142

that these practices in the schools violate the First Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment. They take this position consistently with the policy they have adhered to for many years supporting the constitutional principle of separation of church and state and the constitutional guarantee of religious freedom. That policy has prompted them in the past to submit briefs *amici curiae* in this and other courts, most recently in *Engel v. Vitale* (October Term, 1961, No. 468), *Gallagher v. Crown Kosher Super Market* (October Term, 1960, No. 11) and *Braunfeld v. Gibbons* (October Term, 1960, No. 67), and earlier in *People ex rel. McCollum v. Board of Education*, 333 U. S. 203 (1948).

The undersigned organizations are deeply committed to the traditions of the Jewish religion. Many of them are directly involved in maintaining religious worship and in the vital task of religious teaching. They believe, however, that such worship and teaching are not appropriate in public schools:

If permitted to submit a brief in this case, the undersigned will present arguments that are based on their experience in counselling with millions of Jews in this country. In particular, they will argue that it is entirely illusory to believe as did the majority of the Maryland Court of Appeals, that the element of coercion in the public school atmosphere can be eliminated by allowing children to be excused from ceremonies ordained by school officials and conducted by their classroom teachers. They will argue that the decision below cannot be affirmed without ignoring the fact that, despite the right to withdraw, there is "an obvious pressure upon children to attend. . . . Mr. Justice Frankfurter concurring in *People ex rel. McCollum v. Board of Education*, 333 U. S. 203, 227 (1948).

The undersigned organizations will also seek to show, on the basis of their knowledge as spokesmen for religious groups, that neither the reading of the Bible nor the recitation of the Lord's Prayer can be deemed non-sectarian exercises. They will seek further to show that use of any form of the Bible and state-sponsored recitation of the Lord's Prayer in effect constitute state endorsement of the truth and religious validity of the faith with which the particular version of the Bible or Lord's Prayer is associated.

Finally, the undersigned organizations, representing as they do all branches of American Judaism, will seek to show that the exclusion of Bible reading and prayer recitation from the public schools does not manifest hostility towards religion, but on the contrary insures the freedom of religious groups to fulfil their mission in accordance with their conscience by preserving the integrity of religion and the mutual independence of religion and state.

We have sought the consent of counsel for the parties to the filing of this brief. Counsel for petitioners in No. 119 and counsel for appellees in No. 142 have consented. Counsel for respondents in No. 119 and for appellants in No. 142 have stated that they neither consent to nor oppose the filing of such a brief.

Respectfully submitted,

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Relations Advisory Council.*

*Amici Curiae*

15 East 84th Street  
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January 4, 1963.

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IN THE

# Supreme Court of the United States

October Term, 1962

No. 119

WILLIAM J. MURRAY, III, Infant, etc., et al.,

*Petitioners.*

*against*

JOHN N. CURLETT, et al.,

*Respondents.*

No. 142

SCHOOL DISTRICT OF ABINGTON TOWNSHIP, et al.,

*Appellants.*

*against*

EDWARD LEWIS SCHEMP, et al.,

*Respondents.*

## BRIEF OF THE AMERICAN ETHICAL UNION AS AMICUS CURIAE

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IN THE  
**Supreme Court of the United States**

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**No. 119**

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**WILLIAM J. MURRAY, III, Infant, etc., et al.,**  
*Petitioners,*

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**JOHN N. CURLETT, et al.,**  
*Respondents.*

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**No. 142**

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**SCHOOL DISTRICT OF ABINGTON TOWNSHIP, et al.,**  
*Appellants,*

*against*

**EDWARD LEWIS SCHEMP, et al.,**  
*Respondents.*

---

**BRIEF OF THE AMERICAN ETHICAL UNION AS  
AMICUS CURIAE**

**The Interest of the American Ethical Union**

This brief is submitted on behalf of the American Ethical Union pursuant to leave granted by this Court.

The American Ethical Union is a federation of Ethical Culture Societies and Fellowships in the United States.

which, collectively, constitute a liberal religious fellowship known as the "Ethical Movement" or the "Ethical Culture Movement."

There are thirty Societies and Fellowships of the American Ethical Union in eleven states and the District of Columbia, including the States of Maryland and Pennsylvania. Through its membership in the International Humanist and Ethical Union, the American Ethical Union is part of a world-wide association of Humanist and Ethical Culture groups. At the third International Congress held in Oslo in 1962, delegates attended from 24 countries including the United States, Great Britain, Iran, Holland, Norway, Germany, Japan and Colombia.

As the central organization of the Ethical Culture Movement in the United States, the American Ethical Union is concerned with the effect of the religious practices here in issue upon Ethical Culture members and their children in the States of Maryland and Pennsylvania and elsewhere in the United States. Ethical Culture has been recognized as one of those "religions in this country which do not teach what would generally be considered a belief in the existence of God." *Torcaso v. Watkins*, 367 U. S. 488 at 495 n. 11. This Court, in *Torcaso*, noted among other such religions, Buddhism, Confucianism, Taoism and Secular Humanism. A fundamental tenet of Ethical Culture is the freedom of each individual to determine for himself whether or not to relate his religious aspirations to the existence of a Supreme Being. Accordingly, and equally fundamentally, Ethical Culture rejects organized prayer to a Supreme Being and rejects public reading of the Bible as a religious exercise.

## ARGUMENT

### **Bible Reading as a Ceremonial Function in Public Schools and Ceremonial Recitation of the Lord's Prayer in Public Schools Constitute Governmental Intrusion of Sectarian Religion in Secular Education in Violation of the First and Fourteenth Amendments.**

In this brief we will not review the history and case law relating to the Free Exercise and Establishment clauses of the First Amendment, since that would be repetitious of the briefs submitted by the parties and other *amici*. Instead, we will present to this Court considerations indicating how the practices here under review violate the religious beliefs and constitutional rights of adherents of a non-theistic religion such as Ethical Culture.

Non-theism is a view which neither categorically denies, nor dogmatically affirms, the existence of a Supreme Being. Organized non-theistic religious groups, such as the Ethical Culture Societies, include members whose personal faith includes a Supreme Being, and those whose personal faith does not. The concept of freedom of thought and privacy of judgment in such matters is an essential part of Ethical religion. In the words of a leader of the Ethical Movement, "Toward worship, theism, prayer, Ethical Societies take an attitude of strict neutrality, in order that the freedom of ethical fellowship may be kept absolutely inviolate. Some of us are theists, but none of us could ever be induced to join or to lead a Society that made belief in God a condition of membership." (Martin, *Aspects of Ethical Religion*, 92, Ed. Bridges.)

The Ethical Culture Societies conduct services, and maintain religious schools for children which meet regularly on Sunday mornings. The Leaders of the Societies perform the functions of ministers, officiating at marriages and funerals and counselling members on moral and ethical problems. But the outward forms of worship characteristic of most theistic religions are rejected by Ethical Culture.

The Sunday meetings of Ethical Culture Societies do not include prayer or congregational Bible reading as part of the service. Nor is there ever any organized appeal or supplication to a Supreme Being. "The meeting has simplicity without elaborate ritual. Ordinarily it centers on an address by a Leader or by a Guest Speaker chosen for distinguished achievement in some field of human relations." (*Do You Know the Ethical Movement*, pamphlet published by The American Ethical Union, 2 W. 64 St., New York 23, New York, p. 4.)

In their Sunday Schools, Ethical Culture Societies carefully avoid developing in their children a view of life that is dependent upon the dogma of the divine word or the worship of a Supreme Being. The program seeks to impart to the children instead an understanding of the religious and cultural heritage of other groups and of the dignity and worth of each individual in order that they may better understand their own Ethical and humanistic heritage.

In part, the study by the children of the traditions of other religions is based upon religious literature, including the Old and the New Testament. The curriculum of the Sunday School of the New York Society for Ethical Culture states that: "The Old and the New Testament are examined as literary documents with great ethical im-

port which have exerted a far-reaching influence on Western civilization." (*The Sunday School of the New York Society for Ethical Culture*, pamphlet published by the New York Society for Ethical Culture, 2 West 64th Street, New York, New York.) The study of the Bibles and the doctrines therein contained is made under the supervision of a Sunday School teacher who can aid the children in comparing one with another so that their similarities and differences may be brought forth as well as their religious and moral significance.

The Ethical Movement does not subscribe to the claims of any of the various Holy Books of mankind as being the ultimate word. Leaving to each of its members the personal decision as to their divine nature, Ethical Culture draws from various scriptures their moral and ethical principles. "It starts where the Jewish and Christian communions stop, seeing in the ethical precepts of the Old Testament and in those of the New, stages in the evolution of moral standards beyond which we are now to advance." (*Aspects of Ethical Religion*, *op. cit. supra* at p. 99.)

The ceremonial reading of the Bible and recitation of the Lord's Prayer are necessarily offensive to children of followers of the Ethical religion, since they express official sanction of dogmas and practices to which these children cannot subscribe. Even among theistic religions, the Bible readings heard by the children include doctrines not accepted by some sects or denominations. (*Schempp v. School District of Abington Township*, 177 F. Supp. 398, 400 n. 11 (E. D. Pa. 1959).)

It is not only the sectarian doctrines themselves but the manner of their presentation which gives offense. Reading of the Bible to or by congregations and congrega-

tional recitations of prayer are not only rejected by Ethical Culture, but also by other denominations, including a number of theistic groups which shun such practices.

The fact that there is a Protestant version (the King James Bible) and a Roman Catholic version (the Douay Bible)—neither of which is accepted by those of the Jewish faith—underscores the fact that ceremonial Bible reading in the schools favors some religions over others. Which Bible is used tends to depend upon the religious leanings of the predominant group and officials in the particular community—in disregard, of course, of the religious views of the minority in that community.

With respect to the King James version (that used by the school boards now before this Court), it has been said that “Protestant Bible reading might well be construed as a multiple establishment of religion . . . intended to give state support and sanction to the religious belief of Protestants in general in preference to those of Roman Catholics, Jews, other non-Christians, and non-believers.” Butts, *The American Tradition in Religion and Education*, 196 (1950). See also Moehlman, *The Wall of Separation between Church and State*, 153 (1951).

Similarly, the Lord's Prayer has sectarian aspects among Christian faiths. Conrad Henry Moehlman, late James B. Colgate, Professor of the History of Christianity at the Colgate-Rochester Divinity School, compares the different versions of the Lord's Prayer and relates the confusion that ensues when children of different Christian faiths attempt to recite the Lord's Prayer in unison. (Moehlman *School and Church: The American Way*, 110-111 (1954)). Worse than confusion arises, of course, when children of non-theistic or non-Christian religions are pupils in the schools which follow this practice.



Insofar as these cases involve recitation of the Lord's Prayer in the public schools, they would seem indisputably controlled by *Engel v. Vitale*, 370 U. S. 421. In *Engel*, this Court struck down a so-called "non-denominational prayer" which was said to be inoffensive and adaptable to all religions. As Edmond Cahn has cogently stated, that concept "is self-contradictory; it is a chimera. A non-denominational prayer does not and cannot be made to exist. It is as impossible as the progeny of a mule." (Cahn, *On Government And Prayer*, 37 N. Y. U. L. Rev. 981, 992, 1962.) In any event, in *Engel* this Court held the organized recitation of a "non-denominational prayer" invalid as an establishment of religion within the meaning of the First Amendment, since it was performance of "a religious exercise in a governmental institution". It follows *a fortiori* that the Lord's Prayer, which could not possibly be considered "non-denominational", is likewise an unconstitutional exercise in government-sponsored religion. It does not seem necessary, in light of *Engel v. Vitale*, to elaborate further on the nature of the Lord's Prayer, its incompatibility with non-theistic religions such as Ethical Culture, and its unacceptability to followers of a number of theistic religions.

Insofar as these cases involve readings from the Bible, we believe that the *Engel* case also governs. The Bible readings here in question—which are part of the daily opening exercises—are equivalent to the recitation of the Regent's Prayer in the *Engel* case. They are ceremonial and devotional in character. Indeed in the Maryland case, they may be used interchangeably with recitation of the Lord's Prayer. There is no element of exposition or teaching associated with these ceremonial readings of the Bible;

they are obviously, like the reading of the Lord's Prayer, religious rather than educational in character. Accordingly, such readings also fall within the category of an establishment of religion.

This Court has held that "neither a State nor the Federal Government can constitutionally force a person to profess a belief or disbelief in any religion" nor "constitutionally pass laws nor impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." (*Torcaso v. Watkins*, *supra* at 495.) By prescribing the activities here in issue, the school boards in these cases have done precisely what was said to be prohibited in the *Torcaso* case.<sup>1</sup>

The claim that these practices are excused because of alleged absence of coercion has been raised in the present cases because of the provisions for excusing a pupil from the devotional part of the schools' opening exercises upon the request of parent or guardian. That question has been settled contrary to the position of the school boards. This Court said, in *Engel*:

1. A number of state courts have declared Bible reading and prayer recitations in public schools to be unconstitutional. The Supreme Court of Illinois expressly found that reading of the Bible in public schools constituted sectarian instruction in public institutions in addition to being a form of religious worship commonly practiced by certain sects, particularly when combined with the Lord's Prayer. (*People ex rel. Ring v. Board of Education*, 245 Ill. 334, 92 N. E. 251 (1910). See also *State ex rel. Weiss v. District Board*, 76 Wisc. 177, 44 N. W. 967 (1890), *State ex rel. Freeman v. Scherer*, 65 Nebr. 853, 91 N. W. 846 (1902), *Herold v. Parish Board*, 136 La. 1034, 68 So. 116 (1915)). The Supreme Court of New Jersey has held unconstitutional the mere free distribution of Bibles in the public schools on the ground that the schools would be aiding one sect to the detriment of others. (*Tudor v. Board of Education*, 14 N. J. 31, 100 A 2d 857 (1953), cert. denied 348 U. S. 816.)

"The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that."

*Engel v. Vitale*, *supra*, at p. 430.

See also

*People ex rel. McCollum v. Board of Education*,  
333 U. S. 203 (1948), p. 227.<sup>2</sup>

It is submitted, therefore that recitation of the Lord's Prayer and the Bible reading prescribed by the school boards for the public schools, like the prayer in the *Engel* case, constitute an establishment of religion and an interference with the free exercise of religion under *Engel*, *Everson v. Board of Education*, 330 U. S. 1, and *West Virginia State Board of Education v. Barnette*, 319 U. S. 624. These religious practices interfere with the rights of parents to raise their children in their own reli-

2. On the coercive impact of situations such as those here involved, it has been pointed out, in a discussion of the contention that the "non-denominational" prayer involved in the *Engel* case was "merely optional":

"They were actually satisfied to tell a school child of normal sensibility, 'If you want to be different from everyone else, you can remain silent while your classmates pray in unison to God; you can conspicuously absent yourself at the opening of school while they ask God to bless their parents and their country. No coercion, purely voluntary.' If one can believe that, one can believe anything." (*Cahn op. cit. supra* at p. 987).

gious traditions and impose disadvantages upon the children, under the mantle of governmental authority, for their failure to subscribe to the religious practices of others. This use of a public school system as a means of religious indoctrination causes dissension in the community along religious lines. The First and Fourteenth Amendments were designed to prevent just that.

This Court noted in *Engel* that the protection of the rights of religious minorities and the protection of the fabric of democratic society as we have known it requires

"that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance." (*Ibid.*, at p. 435.)

### Conclusion

The prescribed practices of Bible reading and recitation of the Lord's Prayer in the public schools of Maryland and Pennsylvania violate the First and Fourteenth Amendments. The decision in No. 119 should be reversed and the decision in No. 142 should be affirmed.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1962

No. 119

**WILLIAM J. MURRAY, III, INFANT, BY MADALYN E.  
MURRAY, HIS MOTHER AND NEXT FRIEND, AND  
MADALYN E. MURRAY, INDIVIDUALLY,**  
*Petitioners,*

v.

**JOHN N. CURLETT, PRESIDENT, SAMUEL EPSTEIN,  
MRS. M. RICHMOND FARRING, ELI FRANK, JR.,  
DR. ROGER HOWELL, HENRY P. IRR, DR. WIL-  
LIAM D. McELROY, MRS. ELIZABETH MURPHY  
PHILLIPS, JOHN R. SHERWOOD, INDIVIDUALLY, AND  
CONSTITUTING THE BOARD OF SCHOOL COMMIS-  
SIONERS OF BALTIMORE CITY,**

*Respondents.*

**BRIEF AND APPENDIX OF ATTORNEY GENERAL  
OF MARYLAND, AMICUS CURIAE**

**In which the several States shown on the Appendix have  
joined through their Attorneys General (Names of other  
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Hon. Eugene Cook  
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Hon. Allan G. Shepard  
Attorney General  
State of Idaho

Hon. William M. Ferguson  
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Hon. Jack P. F. Gremillion  
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Hon. Frank E. Hancock  
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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1962

No. 119

WILLIAM J. MURRAY, III, INFANT, ETC., ET AL.,  
*Petitioners.*

v.

JOHN N. CURLETT, ET AL.,  
*Respondents.*

**BRIEF OF ATTORNEY GENERAL OF MARYLAND,  
AMICUS CURIAE**

**In which the several States shown on the Appendix have  
joined through their Attorneys General.**

**THE INTEREST OF THE STATE OF MARYLAND**

This brief is submitted by the Attorney General of Maryland, on behalf of the State of Maryland, to ask this Honorable Court to sustain the decision of the Court of Appeals of Maryland in the case of *Murray, et al. v. Curlett, et al.*, 228 Md. 239, 179 A. 2d 698.

The practice concerning which the Petitioners herein complain, that of the use of prayer or Bible readings as devotional exercises in the public schools of Baltimore, is in use not only within the geographic limits of that city, but also in each of the twenty-three counties of this State. An examination of local law in each of those counties re-

veals that this practice is not in use because of any ordinance, statute or school board regulation in those counties, but is a traditional one, and a practice which has existed for generations. Without exception, in each of Maryland's counties, as well as in Baltimore City, religious opening exercises are conducted on a voluntary basis, and those children who do not desire to participate are excused from so doing. Although in some few instances pupils have requested to be excused from these services, there have been no instances of objections being made to the practice itself, other than that involved herein.

It is, therefore, because of the statewide implication of the questions presented in this case that this brief is presented on behalf of the State of Maryland. It is because of the nationwide implication of this question that the Attorneys General of eighteen States have joined with us, as *amicus curiae*, to ask that this Court not hold religious opening exercises in the public schools to be in violation of the Constitution of the United States. The names of the Attorneys General who join with us, and the states which they serve, are set out at the conclusion of this brief.

### **JURISDICTION**

The Petitioners herein invoked the jurisdiction of the Court under Title 28 U.S.C., Section 1257(3).

This brief of the State of Maryland as *amicus curiae* is filed under authority of Supreme Court Rules, Title 28 U.S.C. Rule 27, 1, (d).

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

This case involves (1) the First Amendment to the Constitution of the United States, (2) Section 1 of the Fourteenth Amendment of the Constitution of the United States,

(3) Article 77, Sections 202, 203, and 231 of the Annotated Code of Maryland (1957 Edition), (4) Section 91 of the Charter and Public Local Laws of Baltimore City, (Flack, 1949), (5) Article 6, Section 6 of Rules of Board of School Commissioners of Baltimore City, (Amendment to Rule adopted November 17, 1960.)

The pertinent portions of the constitutional and statutory provisions involved are set forth verbatim on Page 4 of Petitioners brief.

### **QUESTION PRESENTED**

Whether the use of the Lord's prayer and verses from the bible recited without comment as daily opening exercises in the public schools of Baltimore City, pursuant to a rule of the Board of School Commissioners of Baltimore City, violates the First Amendment of the Constitution of the United States where attendance during such recitation is not compulsory.

### **STATEMENT OF THE CASE**

The Attorney General of Maryland adopts as the Statement of the Case herein, the Statement of the Case as presented on Page 3 of the brief of the Respondents, John N. Curlett, et al.

### **SUMMARY OF ARGUMENT**

Reversal of the decision of the Court of Appeals of Maryland in this case will require by necessary implication the prohibition of all official public acknowledgments of the Divinity and the theistic concept of our origin and end.

Reversal of the decision of the Court of Appeals of Maryland will by necessary implication impose upon the

populace an atheistic or at least agnostic concept of our origin and end and will itself constitute the establishment of a religion.

## ARGUMENT

### I.

**Reversal of the Decision of the Court of Appeals of Maryland In This Case Will Require by Necessary Implication the Prohibition of All Official Public Acknowledgments of the Divinity and the Theistic Concept of Our Origin and End.**

The practice of reciting the Lord's Prayer, or reading selected verses from Scriptures as opening exercises in the public schools of Baltimore is not in violation of the First Amendment to the Constitution of the United States.

The objections to the use of prayer, or readings from Scriptures, or any devotional exercises in the public schools of Baltimore are based upon the initial prohibition of the First Amendment to the Constitution of the United States, as made applicable to the states through the Fourteenth Amendment.

In considering this question, the Court of Appeals of Maryland in *Murray, et al. v. Curlett, et al., supra*, held that the practice was not a violation of the "establishment of religion" clause and "free exercise" clause of the First Amendment, nor of the "equal protection" clause of the Fourteenth Amendment. In its decision, dated April 6, 1962, the Maryland Court reviewed the decisions of this Honorable Court to that date, and found that this Court had not then passed on the constitutional questions involved in the appeal then before it. Judge Horney, speaking for the majority of a divided court, found that the decisions of this court clearly indicated that the public school exercise complained of did not violate any pro-



vision of the Constitution of the United States. The Court of Appeals noted that it found this exercise to be in the same category as the opening prayer ceremonies in the Legislature of the State of Maryland, and in the Congress of the United States. For those reasons and particularly because the infant Petitioner was not compelled to participate in or to attend the program he claimed was offensive to him, the Court upheld the action of the *nisi prius* judge in dismissing the petition.

Shortly after the decision of the Court of Appeals of Maryland, this Honorable Court, on June 25, 1962, rendered its decision in the case of *Engel v. Vitale*, 8 L. Ed. 601, which decision held a non-denominational prayer composed by the Board of Regents of the State of New York for use in the public schools of that State, to be in violation of the First Amendment. The Attorney General of Maryland had joined on the brief of the Attorney General of Nevada as *amicus curiae* in the *Engel* case, as it was our view that the New York prayer was not in violation of the First Amendment. We accept, however, as we must, the decision of this Court in that case.

We do not believe that the *Engel* decision controls the question now before this Honorable Court. We submit that that decision should be limited to apply only to (1) the prayer then in question, which had been composed by officials of the State of New York, and (2) any prayer composed by State or other governmental officials. We do not believe that *Engel* prohibits the various states from permitting, in their public school systems, opening devotional exercises which have not been composed by any governmental agency.

We believe that this distinction is valid, and we respectfully urge it upon the Court as a basis for finding

constitutionally unassailable the practice involved herein. The arguments in favor of that basis of distinction are clearly set forth in the brief of Respondent Board of Education of Baltimore City, and are adopted by us.

However, we wish to point out that if that distinction is abolished in the present case and if the practices involved herein are held to violate the First Amendment, the results proposed in the concurring opinion in *Engel v. Vitale*, 8 L. Ed. 601, are logically unassailable and are inevitable. If the recognition of the existence of and our reliance upon a Divine Providence cannot constitutionally be allowed in our public schools because it constitutes indirect coercive pressure upon religious minorities, certainly no less pressure is exerted by the reading of our basic and organic documents and the singing of the officially espoused anthems, which establish such recognition as the fundament of our national heritage.

If such expressions as "with a firm reliance upon the protection of Divine Providence"; "that the Supreme Lawgiver of the Universe by illuminating those to whom it is addressed, may on the one hand turn their councils from every act which would affront his Holy prerogative";<sup>1</sup> "That Almighty God both created the mind free, and manifested his Supreme Will that free it shall remain by making it altogether insusceptible of restraint";<sup>2</sup> and "the term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character and of

<sup>1</sup> "We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313.

<sup>2</sup> These words are found in the closing sentence of the Declaration of Independence.

<sup>3</sup> MADISON, *Memorial and Remonstrances Against Religious Assessments*, Article 15.

<sup>4</sup> JEFFERSON, Bill for Establishing Religious Freedom.

obedience to his will" do not constitute implied, if not express, recognition of the existence of a Divinity supported not only by the power and prestige but also by the fundamental philosophy of our government, then they must be cast aside as meaningless cant. If the invocation of God and the supplication of his aid in our governmental assemblies are not a recognition of theism financed by the State, then such invocations must be treated as falsehoods uttered to delude a theistic populace. Unless the expressions of our basic documents are treated as cant and the invocations of our highest assemblies are treated as falsehoods, they must be considered to stand in the same relation to the Constitution as the simple invocation and supplication contained in the Lord's Prayer, and a recitation of a few verses from the Bible.

It is the grave fear of the State of Maryland that the striking down of the practices of the public schools of Baltimore, and inferentially of the whole State, in regard to such recitation, must by inexorable logic strike down all official utterances or practices acknowledging, or even referring to, a Divine Power as author and governor of our affairs. The complaint in this matter is made by an atheist on the basis that his faith in non-God is offended in a constitutional sense, by the practices in question.<sup>6</sup> No references to a Creator, a God, a Divinity or Divine Providence, however non-sectarian, however otherwise innocuous, could be conceived of which would not in the same sense be offensive to him and his co-religionists. If that practice is held unconstitutional, the heritage upon

<sup>6</sup> *Davis v. Beason*, 133 U.S. 333, 342

<sup>6</sup> A concise statement of Petitioner's creed as an atheist is set forth in paragraph 7 of the Petition for Writ of Mandamus filed by him in the Superior Court of Baltimore City and which is reproduced at Pages 4 and 5 of the Transcript of Record herein.

which our Nation was founded, and upon which it now rests, will have been stricken down.

We do not believe that the founders of this Nation and framers of the Constitution ever intended that document to be interpreted in such a manner that acknowledgment of the existence of God would be forbidden by its terms.

It is our belief that the founders of this Nation, themselves religious men, and including among their number many who had known religious oppression, intended only to prevent the establishment of an official form of belief or non-belief, and intended to provide that every man should be free to worship or not worship in the manner and to the extent he chose. Whatever the actual intention of the authors of the Constitution and the First Amendment, however, it is clear that the overwhelming majority of the citizens of this nation today do not believe that opening devotional exercises in the public schools are offensive.

In our Appendix hereto we attempt to summarize the practice in each of the states in this Nation concerning devotional exercises in the public schools. We have compiled this table with the assistance of the Attorneys General of each of the several states, and believe it to be an accurate summary. An examination of that survey discloses that of the forty-eight states surveyed (Maryland and Pennsylvania excepted), in no fewer than thirty-seven states opening devotional exercises are permitted and held, to some extent. As the Appendix reveals, certain states require such an exercise by Constitution or statute, while

<sup>1</sup> The "Virginia Bill for Religious Liberty" originally written by Thomas Jefferson, a portion of whose original draft thereof has been quoted above, has been recognized by the Court as having had the same objective and as having intended to provide the same protection against governmental intrusion on religious liberty as the First Amendment. *Everson v. Board of Education*, 330 U.S. 1, 13 and cases therein cited.

in others the law is silent, and the practice traditional. In only seven states is the practice clearly forbidden by statute, judicial decision, or by Opinion of the Attorney General. In two states, the law is silent, but the practice does not exist, and we are not advised as to the current practice or law in this regard in the states of New York and Nevada.

The direct results of a holding by this Court that devotional exercises in the public schools of this County are in violation of the Constitution are apparent; the indirect results will be disruptive of our highest traditions.

## II.

**Reversal of the Decision of the Court of Appeals of Maryland Will By Necessary Implication Impose Upon the People an Atheistic Or At Least Agnostic Concept of Our Origin and End and Will Itself Constitute the Establishment of a Religion.**

We are not unmindful of the cautionary maxim that the narrow issues before the Court should not be exceeded. Nevertheless, we submit that the issues here presented require a deeper and yet more direct thrust. Religion as placed before the Court in this case is religion laid bare past its bones to its very essence.

The issue is not one of divergence among various sects or persuasions as to the manner in which a Divine Power is to be acknowledged and invoked, but rather, it is whether our origins, aspirations and ends must be officially presented with reference to a Divine Author or to a non-Divine Author. If, as we have indicated above, reversal of the Court of Appeals of Maryland in this case requires eradication from public activities of any acknowledgment of the Divinity, it will likewise cause the substitution thereof of some non-Divine Entity. Official neutrality in regard

to religion so presented is a rational impossibility, for such neutrality itself imposes upon the public the establishment of a religion in the very sense in which that concept has been presented to the Court in this case.<sup>\*</sup>

Petitioner has claimed the protection of the free exercise clause for his practice of atheism, which he terms a faith and which he equates with "religion" as used in the First Amendment. In so describing his atheism he is doubtless correct, in the constitutional sense. No single definition of religion as therein used has yet been satisfactorily agreed upon. The Court in *Davis v. Beason*, 133 U.S. 333 defines religion as follows:

"The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."

This definition, if literally read, would exclude the atheist and his faith, since it presupposes the existence of that which the atheist's faith requires him to deny. It is clear, however, that "religion" as used in both the free exercise clause and the establishment clause is broad enough to encompass atheism,<sup>9</sup> and within the circumstances of this case the controversy is between that broad area of religion which acknowledges a Divinity, and that much narrower area which denies a Divinity or substitutes a material or secular entity for the Divine. These concepts are so basically opposed as to be mutually exclusive.

If it is a prohibition of the free exercise of the religion of atheism for a State or the Federal Government officially

<sup>\*</sup> "When the power, prestige, and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engel v. Vitale*, 370 U.S. 421, 81-1 Ed. 601, 608.

<sup>9</sup> Cf. *Torcaso v. Watkins*, 367 U.S. 488, 495, n. 11.



to recognize the Divinity or the Divine origin of the forces which ultimately control man, it is no less a prohibition of the free exercise of theistic religion officially to prohibit such official recognition. Even the most primitive and most brutish minds perceive and recognize the existence and operation of forces uncontrolled by man. A State which officially prohibits the identification of such forces with Divinity in the educational medium which, with certain safeguards, it compels its youth to attend and its populace to support, substitutes within that medium an identification of those forces with a non-Divinity.

Since men and nations rely by nature upon some intangible force as the source and director of their destinies, an official eradication of "One Nation Under God" leaves us necessarily with One Nation under something other than God; an official ban against our officially having "reliance on Divine Providence" of necessity leaves us relying officially on non-Divine Providence. Whether that non-Divinity be chance or nature, whether it be the State itself or abstract ethical principles, some non-Divine identification of the source of our moral precepts, our beginnings and our end will have been imposed willingly or unwillingly upon the citizens of Maryland and upon the Nation.<sup>10</sup>

Similarly, if it constitutes the establishment of a theistic religion to recite in public schools, under the circumstances of the present controversy, an ancient and revered acknowledgment of Divinity, it must equally constitute the establishment of an atheistic, or at least agnostic, religion to ban by official pronouncement such recitation. Religion in its broadest aspect, touching as it does every aspect of

<sup>10</sup> We commend to the Court's attention in this regard the quotations set forth at Footnote 9 on Page 39 of Appellant's brief in the companion case, *School District, et al. v. Schempp et al.*, October Term, 1962, No. 142.

human endeavor and human existence, does not admit of neutrality, since that neutrality itself is a religion<sup>11</sup> which if officially espoused, is officially established.

Such establishment would effectively accomplish the shackling of men's tongues to make them speak only the religious thoughts that government wanted them to speak, which was the very evil, as this Court stated in *Engel*,<sup>12</sup> the First Amendment sought to avoid.

We submit that, since neutrality in the true sense is impossible; since any decision must, in the context of the *Engel* decision, establish either an acknowledgment of God or His official rejection, the Court's decision should support the heritage revered by the majority, rather than the comparative novelty preached by the minority. We submit that since no present evil or deprivation is shown to be involved in the practices of the Respondent,<sup>13</sup> the Court's decision should support that which is imbedded in the very grain of our civilization.

<sup>11</sup> We submit that the definition of "agnostic" contained in *Webster's New International Dictionary, Second Edition* (unabridged) at Page 50 is compatible with nothing other than neutrality.

<sup>12</sup> 8 L. Ed. 601, 610.

<sup>13</sup> No expenditure of public money or direct coercion of the Petitioner was alleged in his Petition for Writ of Mandamus.

**CONCLUSION**

For the reasons stated herein and for the reasons set forth in the Respondents' brief, the Attorney General, on behalf of the State of Maryland, respectfully submits that the decision of the Court of Appeals of Maryland should be affirmed.

Respectfully submitted,

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## APPENDIX

## ALABAMA

Section 542, Title 52, Code of Alabama 1940, requires the Holy Bible to be read once every day in schools supported in whole or in part by public funds.

## ALASKA

Regulations of the State Board of Education do not permit the use of opening religious exercises.

## ARIZONA

Article XI, Section 7 of the Arizona Constitution prohibits sectarian *instructions* in public schools. By statute, ARS Section 15-203, the certificate of any teacher who uses sectarian books or teaches a religious doctrine shall be revoked. Religious opening exercises are rarely held in Arizona public schools.

## ARKANSAS

Arkansas Statutes Annotated Section 80-1606 provides that every teacher shall provide for the reverent daily reading of a portion of the English Bible without comment in every public tax supported school, and that prayer may be offered or the Lord's Prayer recited. The statute also provides that no pupil shall be required to take part and that any pupil shall be excused from the room on written request from a parent or guardian.

## CALIFORNIA

Opinion No. 53-266 of the Attorney General of California interprets the law in that state as prohibiting the reading of the Bible for religious purposes or uttering religious prayers in the public schools.

## COLORADO

The practice of Lord's Prayer and Bible reading is permitted in Colorado under *People ex rel Vollmer v. Stanley*, 81 Colo. 276, 255 P. 610. The practice is rarely exercised.

## CONNECTICUT

The State law is silent on the question of religious exercises in public schools. In some of such schools, however, the Lord's Prayer is recited at the beginning of the day and in others a non-sectarian form of Grace is said before meals, on a voluntary basis.

## DELAWARE

Article 14, Delaware Code Annotated, Sections 4102 and 4103 provides for daily Bible reading in all of the public schools.

## FLORIDA

Bible reading "without sectarian comment" has been upheld, on a voluntary basis, in *Chamberlin v. Dade County*, Circuit Court for Dade County, Case No. 59-C-4928 and No. 59-C-8873. 1 Florida Statutes, Section 231.09 (2) permits this practice.

## GEORGIA

Georgia Code Annotated, Section 32-705 provides that the Bible, including the Old and New Testament shall be read in all of the schools receiving State funds, on a voluntary basis.

## HAWAII

Rule No. 6122.81 of the Board of Education of Hawaii forbids religious instruction in the public schools but permits the practice of opening school with devotional exercises on a voluntary basis.

## IDAHO

Article IX, Section 6 of the Constitution of the State of Idaho provides that no teacher or student of any public school shall ever be required to attend or participate in any religious service. Idaho Code, Section 33-2704 provides that selections from the Standard American Bible shall be read in all public schools. The practice required by the Code is universally carried out.

## ILLINOIS

*People v. Board of Education*, 245 Ill. 334, 92 N.E. 251 interprets the Constitution of Illinois as forbidding the recital of prayers or the reading of Scriptures in public schools.

## INDIANA

Indiana Statutes Annotated, Section 28-5105 permits daily Bible reading in the public schools.

## IOWA

Section 280.9, 1962 Code of Iowa, provides that the Bible shall not be excluded from any public school or institution in the State, and that no child shall be required to read it contrary to the wishes of his parents or guardian. The constitutionality of this statute was upheld in *Moore v. Monroe*, 64 Iowa 367, 20 N.W. 475 (1884). The Principal of each school in Iowa determines whether the Lord's Prayer is to be recited in that school.

## KANSAS

G.S. Kan. 1949, 72-1722 and 72-1819 prohibit the teaching of sectarian doctrines in the public schools and provide that the Holy Scriptures without note or comment may be used therein. *Billard v. Board of Education*, 69 Kan. 53, 76 Pac. 422 (1904) held that the repeating of the Lord's Prayer and the Twenty-third Psalm as a morning exercise were not prohibited by Kansas law.

## KENTUCKY

In *Hackett v. Brooksville*, 87 S.W. 792 (1905) the Court of Appeals of Kentucky upheld the use of prayer in the public schools. Opinions of the Attorney General 62-779 interpret present Kentucky law as permitting the use of the Lord's Prayer or selections from the Bible as opening religious exercises.



## LOUISIANA

Opening religious exercises are permitted, by tradition, in this State. Such a practice has been held by the Attorney General of Louisiana to be not in conflict with the State law. Senate Concurrent Resolution No. 57 (1962) of the Senate of Louisiana expresses the wish of that body that such a practice be continued.

## MAINE

Revised Statutes of Maine, 1954, Chapter 41, Section 145 provides: " \* \* \* there shall be, in all the public schools of the state, \* \* \* readings from the scriptures with special emphasis upon the Ten Commandments, the Psalms of David, the Proverbs of Solomon, the Sermon on the Mount and the Lord's Prayer."

## MASSACHUSETTS

General Laws, Chapter 71, Section 31, provides "that a portion of the Bible shall be read daily in the public schools, without \* \* \* comment" on a voluntary basis.

## MICHIGAN

*Phieffer v. Board of Education*, 118 Mich. 560, 77 N.W. 250, upheld the practice of Bible reading in the public schools. There is no statute permitting or forbidding this practice.

## MINNESOTA

*Kaplan v. Independent School District*, 171 Minn. 142, 214 N.W. 18, upheld the practice of Bible reading in the public schools on a voluntary basis.

## MISSISSIPPI

Section 18 of the Mississippi Constitution of 1890 provides: "No religious test as a qualification for office shall be required; and no preference shall be given by law to any religious sect or mode of worship: \* \* \* The rights

hereby secured shall not be construed to \* \* \* exclude the Holy Bible from use in any public school of this State."

#### MISSOURI

Bible reading or the recitation of prayers are neither required nor forbidden by Missouri law. It does not appear that the practice is in use in any public schools in Missouri.

#### MONTANA

The use of opening religious exercises is within the discretion of the local school boards in Montana. Records of the Department of Public Instruction indicate that less than two per cent of Montana's public schools have such exercises, and those are usually confined to a minute of silent prayer.

#### NEBRASKA

*State v. Schere*, 65 Neb. 853, 91 N.W. 846, interprets the provision of the Nebraska Constitution as forbidding religious exercises in the public schools of Nebraska.

#### NEVADA

Information is not available on the present prayer practice in the State of Nevada.

#### NEW HAMPSHIRE

Pursuant to the provisions of New Hampshire Revised Statutes Annotated, Chapter 189, Section 15, local school boards in New Hampshire may permit opening religious exercises. The schools in that State are generally opened with a recitation of the Lord's Prayer and in some instances by a reading of a portion of the Scriptures.

#### NEW JERSEY

N.J.S.A. 18:14-77 provides that at least five verses taken from the Old Testament shall be read without comment in each public school classroom. Upheld in *Doremus v. Board of Education*, 5 N.J. 435, 75 A.2d 880 (1950). [The Unified

States Supreme Court dismissed the appeal in that case on jurisdictional grounds. 342 U.S. 429, 72 S. Ct. 394, 96 L. Ed. 475.]

#### NEW MEXICO

By tradition, public schools of New Mexico read Bible verses and have public prayer according to the wishes of the local administration. There is no statewide law governing this practice.

#### NEW YORK

Information is not available on the practice existing in the State of New York following the decision of the Supreme Court in *Engel v. Vitale, supra*.

#### NORTH CAROLINA

By tradition most public schools in the State of North Carolina have a daily reading of verses from the Bible, and say a prayer before the school day starts, on a voluntary basis. This practice is not regulated by statute or court decision.

#### NORTH DAKOTA

Section 15-38-12 of the North Dakota Century Code provides: "The Bible shall not be deemed a sectarian book. At the option of the teacher, it may be read in school for not to exceed ten minutes daily, but no sectarian comment shall be made thereon. No pupil shall be required to read it or to be present in the schoolroom during the reading thereof contrary to the wishes of his parents or guardians or other person having him in charge."

Section 15-47-10 of the North Dakota Century Code provides that the Ten Commandments shall be displayed in every public school classroom. The records of the Superintendent of Public Instruction of North Dakota indicate that few of the State's public schools currently follow the practice of reading the Bible.

## OHIO

*Nessle v. Hum*, 2 O.D. 1 Ohio N.P. 140 upheld Bible reading in the public schools of Ohio.

## OKLAHOMA

Title 70, Article 2, Section 1 of the School Code of Oklahoma provides: "No sectarian or religious doctrine shall be taught or inculcated in any of the public schools of this State, but nothing in this section shall be construed to prohibit the reading of the Holy Scriptures." The Office of the State Superintendent of Education advises that it is the practice in most schools of the State to have prayer and reading of the Holy Scriptures as opening exercises in the classrooms.

## OREGON

Oregon has no general statute either permitting or prohibiting the use of opening religious exercises in public schools. Local school districts determine whether or not opening school exercises are to be utilized by their teachers. The practice is followed in some such districts and does not exist in others.

## RHODE ISLAND

By tradition the question of prayer in public schools has been left to the discretion of individual teachers. Where such a practice exists, it is carried out on a voluntary basis without any compulsion on the part of the students.

## SOUTH CAROLINA

Religious exercises, such as silent prayer, reading of Scriptures, or reciting of the Lord's Prayer, are commonly followed as part of the day's activities in the public schools. There is no statutory enactment relating to religious exercises, nor any statewide administrative directive upon this subject.

## SOUTH DAKOTA

Prayers are said by tradition. Opening religious exercises are held in most of the schools of the State. No statute requires or forbids this practice.

## TENNESSEE

Section 49-1307 of the Tennessee Code provides: "It shall be the duty of the teacher \* \* \* to read or cause to be read at the opening of school every day, a selection from the Bible \* \* \*" *Phillip M. Carden v. Bland, et al.*, 199 Tenn. 365, 288 S.W.2d 718, upheld the statute as not being violative of either the State or Federal Constitution.

## TEXAS

*Church v. Bullock*, 104 Tex. 1, 109 S.W. 115, upheld the practice of Bible reading on a voluntary basis in the public schools. In Opinions of the Attorney General of Texas, WW-1445 (1962) that official advised the Texas Education Agency that the recent *Engel* decision did not prohibit the public schools of the State of Texas from allowing prayers or reading passages from the Bible, as long as such prayers were not composed, prescribed, or supported by the State or any political subdivision.

## UTAH

Opening religious exercises are limited to an invocation and the State has no established policy. The question of whether or not any exercise shall be held is left to the discretion of the individual Principal.

## VERMONT

Prayers in the schools of Vermont are neither permitted nor forbidden by State law. The practice exists to some extent and is conducted on a voluntary basis.

## VIRGINIA

Virginia has no statutes relative to religious exercises in the public schools and no regulation or directive of the State Board of Education concerning this practice. Prayers are said in Virginia schools within the discretion of local school authorities. The nature of these exercises varies from school to school.

## WASHINGTON

Because of *State ex rel Dearle v. Fraizer*, 102 Wash., 369, 173 P. 35 (1918) and *State ex rel Clithero v. Showalter*, 159 Wash., 519, 293 P. 1000 (1930) there is no existing practice in the State of Washington of beginning the school day with either the Lord's Prayer or reading of the Bible.

## WEST VIRGINIA

The statutes of West Virginia are silent with reference to opening religious exercises and there is no regulation of the State Board of Education concerning the same. In the majority of the State's public schools some devotional service is conducted each morning on a voluntary basis.

## WISCONSIN

*State ex rel Weiss v. District Board of Education*, 76 Wis. 177, 44 N.W. 767 (1890) interprets the Wisconsin Constitution as forbidding the reading of the Bible in the public schools.

## WYOMING

Article VII, Section 12 of the Wyoming Constitution has been interpreted by the Attorney General of that State as prohibiting religious exercises of any sort in the public schools.



Office Supreme Court, U.S.

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FEB 1 1963

JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

October Term, 1962.

No. 142.

**SCHOOL DISTRICT OF ABINGTON TOWNSHIP, PENNSYLVANIA, JAMES F. KOEHLER, O. H. ENGLISH, EUGENE STULL, M. EDWARD NORTHAM, and CHARLES H. BOEHM, Superintendent of Public Instruction, Commonwealth of Pennsylvania,**

*Appellants,*

v.

**EDWARD LEWIS SCHEMPP, SIDNEY GERBER SCHEMPP, Individually and as Parents and Natural Guardians of ROGER WADE SCHEMPP and DONNA KAY SCHEMPP,**

*Appellees.*

## BRIEF FOR APPELLEES.

**On Appeal From a District Court of Three Judges for the Eastern District of Pennsylvania.**

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Matthew 6:9	4
Matthew 23:1-39	7
Matthew 27:25	7
The Catholic Encyclopedia: Robert Appleton Company, New York (1907), vol. 2	27, 28
The Confession of the Society of Friends, Commonly Called Quakers (1675)	32
The Evening Bulletin, col. 4, p. 52, Oct. 9, 1962	24
Yearbook of the American Churches (National Council of Churches) (1961)	33

IN THE  
**Supreme Court of the United States.**

OCTOBER TERM, 1962.

No. 142.

SCHOOL DISTRICT OF ABINGTON TOWNSHIP,  
PENNSYLVANIA, JAMES F. KOEHLER, O. H.  
ENGLISH, EUGENE STULL, M. EDWARD  
NORTHAM, AND CHARLES H. BOEHM, SUPERIN-  
TENDENT OF PUBLIC INSTRUCTION, COMMONWEALTH OF  
PENNSYLVANIA,

*Appellants,*

EDWARD LEWIS SCHEMP, SIDNEY GERBER  
SCHEMP, INDIVIDUALLY AND AS PARENTS AND NATU-  
RAL GUARDIANS OF ROGER WADE SCHEMP AND  
DONNA KAY SCHEMP,

*Appellees.*

ON APPEAL FROM A DISTRICT COURT OF THREE JUDGES FOR THE  
EASTERN DISTRICT OF PENNSYLVANIA.

**BRIEF FOR APPELLEES**

**STATEMENT OF THE CASE.**

**(a) Jurisdictional Statement.**

Appellees are the Schempp family—husband and wife and two minor children. By their complaint they sought a preliminary injunction, and a permanent injunction after trial, enjoining the ceremonial reading of the King James Version of The Bible and recitation, in ceremonial unison, of the Lord's Prayer in the Schools of Abington Township,



*Statement of the Case*

Montgomery County, Pennsylvania, presently attended by the appellees Roger and Donna Schempp.

This action is brought under Title 28 § 1343 of the U. S. Code (28 U. S. C. A. § 1343) and was heard by a three-judge court pursuant to Title 28 § 2284 of the U. S. Code (28 U. S. C. A. § 2284).

The parent appellees complained on behalf of themselves as parents and as the natural guardians of Roger and Donna, their minor children. At the time of the filing of the action the older son, Ellory, formerly a plaintiff, was a student at the Abington Senior High School but graduated therefrom prior to trial. It is agreed that the application for an injunction is moot as to him.

The practice of reading The Bible in the public schools of Pennsylvania was, at the time suit was filed, made compulsory by section 1516 of the Public School Code of March 10, 1949, P. L. 30, as amended (24 PS § 15-1516) which read in full as follows:

"At least ten verses from the Holy Bible shall be read, or caused to be read, without comment, at the opening of each public school on each school day, by the teacher, in charge: Provided, That, where any teacher has other teachers under and subject to direction, then the teacher exercising such authority shall read the Holy Bible, or cause it to be read, as herein directed.

"If any school teacher, whose duty it shall be to read the Holy Bible, or cause it to be read, shall fail or omit so to do, said school teacher shall, upon charges preferred for such failure or omission, and proof of the same, before the board of school directors of the school district, be discharged."

After trial and decree as reported in 177 F. Supp. 398 [R. 177], and pending perfection of appellants' appeal from that decision, the statute was amended (December 17, 1959, P. L. 1928) to read in full as follows:

"At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian."

On October 24, 1960, this Court vacated the judgment of the District Court and remanded the case to the District Court for further proceedings in the light of the amendment to the original Bible reading statute.

On June 22, 1961, appellees obtained leave to file a supplemental complaint under Rule 15(d). The supplemental complaint consisted solely of the substitution in the complaint of the new citation and text of the amended statute in place of the former citation and text, and the elimination of paragraphs in the complaint relating to Elory Schempp.

Appellant school-district and intervenor appellant, the Superintendent of Public Instruction of the Commonwealth of Pennsylvania, thereafter filed an answer to the supplemental complaint.

After taking further testimony the District Court, on February 1, 1962, declared the amended statute unconstitutional, 201 F. Supp. 815 [R. 228] and issued a final decree enjoining appellants from carrying out the provisions of the statute. That decree has been stayed pending disposition by this Court.

Appellees contend that their rights under the Fourteenth Amendment are and have been violated and will continue to be violated unless this Court declares this statute unconstitutional and enjoins the appellant school district and appellant officers thereof from continuing to conduct the practices of which complaint is made.

**(b) Statement of Facts.**

The appellees Edward Lewis Schempp and Sidney Gerber Schempp are of the Unitarian faith and are members of

the Unitarian Church in Germantown, Philadelphia, Pennsylvania, which they regularly attend together with their three children, Ellory, Roger and Donna.

Ellory was 18 at the time of the original trial and had attended Roslyn Elementary School, Abington Township, the Abington Junior High School and the Abington Senior High School from which he had graduated in June of 1958.

Roger, who was 15 at the time of the trial, was an eighth-grade student in the Huntingdon Junior High School in Abington Township during the academic year previous to the trial, which was held during the summer recess.

Donna Schempp was 12 years old at the time of the trial and also a student at the Abington Junior High School and in the academic year preceding the trial had been in the seventh grade.

At the time of their second appearance at the hearing on the Amended Complaint both children were students at Abington High School.

All of the three children testified at the trial and their evidence discloses that it is the practice in the various schools of the Township which they had attended to observe the opening period of school on each day by a brief ceremony consisting of the reading of ten verses of the King James Version of the Bible, followed by a standing recitation in unison of that portion of the New Testament known in the Christian faith as "The Lord's Prayer",<sup>1</sup> and that generally the ceremony was followed by the familiar Pledge of Allegiance to the Flag, followed by routine school announcements.

Beyond this, however, the three children described a substantial number of variations in the manner and technique employed in the execution of this ceremony. In all of the schools which any of the three children had attended, except one, the Bible reading and the recitation of the prayer was conducted by the individual home room teacher, who either chose a text and read the ten verses herself or

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1. Matthew 6:9.

delegated both choice of text and reading to the students, either in rotation or to volunteers [R. 10, 76, 79]. The only exception to these practices was recounted by Ellory Schempp, who stated that after the Senior High School had moved to a new building equipped with a public address system, the Bible was read over the loud speaker in each classroom following which the voice on the loud speaker directed the children to rise and repeat The Lord's Prayer [R. 11].

Ellory and Donna Schempp testified that during the reading of the Bible, a particularly high standard of physical deportment and attention was exacted and Donna testified that this deportment was not always required when other works were being read [R. 12, 81].

The three Schempp children and their father also testified as to the points of religious doctrine purveyed by the King James Version of the Bible which were contrary to the religious belief which they held and which the father and mother were teaching to their children, specifically, the divinity of Christ, the Immaculate Conception, an anthropomorphic God and the concept of the Trinity.

The father, Edward L. Schempp, pointed out that the manner of presentation, ten verses without comment, was that of a religious ceremony, the material being given a degree of authority and religious significance above normal school authority [R. 31]. In content, the father objected to material in the Old Testament regarding blood sacrifices, uncleanness, and leprosy, together with the whole concept of the Old Testament God which was contrary to the concept of deity which he endeavored to instill in his children. He testified that he did not want his children to acquire an image of Jehovah, the God of vengeance. He pointed out that in the very midst of the Ten Commandments was a verse asserting that God would visit the sins of the father upon the fourth generation—a particular verse he testified had been read in the Abington High School—and the witness went on to assert that this concept of God was in sharp contrast with the God of his own church and as taught in the Schempp family [R. 30-32].

Mr. Schempp also testified that there were innumerable bits of anecdotal material which were quite foreign to his concept of what is good, religious and moral, such as the injunction that one should not eat meat that dies of itself but that it may be fed to "the stranger within thy gates" [R. 32]. (Dr. Solomon Grayzel, who subsequently testified for the plaintiffs as an expert, pointed this out as an example of the unfortunate errors attendant upon ceremonial reading of The Bible without explanation, and stated that this passage meant only that it might be fed to those not governed by religious dietary laws) [R. 50].

Roger Schempp, the younger son, testified that he also attended a Unitarian Sunday school and sometimes church services with his family and that he believed that Christ was a great man but did not believe other things that the King James Version of The Bible asserted concerning Christ and the events of his life and did not believe in the divinity of Christ [R. 75-78].

Donna Schempp, a student in the seventh grade in Huntingdon Junior High School, likewise testified that she attended the Unitarian Sunday school and cited several points of religious belief contrary to that asserted by what she had heard read to her from the King James Version of the Bible in school. She also recounted the reaction of a Jewish friend and fellow student who objected to a reading of the portion of the New Testament. Donna said that she had never made any complaint about the reading of the Bible [R. 79-85].

There is evidence in the record that the combined ceremony of Bible reading and the saying of the prayer was, on frequent occasions, although not uniformly, referred to by both students and teachers as the "morning devotions" [R. 22, 80].

Roger Schempp referred to the ceremony as "morning exercises"; counsel for the School District referred to the ceremony as "devotional services" or "devotional exercises" [R. 23-24, 76].

On behalf of the appellees, Dr. Solomon Grayzel, editor of the Jewish Publication Society, also testified. Dr. Grayzel, after graduation from the City College of New York and Columbia University, attended a Jewish theological seminary, was ordained a Rabbi and received a doctorate of Philosophy from the Dropsie College of Philadelphia, an institution of rabbinical, Semitic and Hebrew studies. The Jewish Publication Society, of which Dr. Grayzel is the editor, was the publisher of the "Holy Scriptures According to the Masoretic Text" and is presently engaged in a retranslation into English from the Hebrew. As part of the translation committee, Dr. Grayzel testified that he was familiar with the King James Version, the Revised Standard Version and both the Douay and the Knox Catholic Versions. Dr. Grayzel testified that there were marked differences between the Jewish Holy Scriptures and the Christian Holy Bible, the most obvious of which was the absence of the New Testament in the Jewish Holy Scriptures [R. 35-43].

Dr. Grayzel testified that from the standpoint of the Jewish faith, the entire New Testament and the concept of Jesus Christ as the Son of God was "practically blasphemous" [R. 44]. He cited at random incidents in the New Testament which were not only sectarian in nature but which tended to ridicule or scorn the Jews or, more particularly, the Jewish religious hierarchy, such as the address of Jesus in Matthew 23, in which the scribes and Pharisees are described as hypocrites [R. 52].

The witness also cited the famous scene portrayed in Matthew 27, in which the trial of Jesus before Pilate is described and in which, as related by the Christian New Testament, the Jews are portrayed as refusing to exchange Barabbas for the release of Jesus but insisting upon crucifixion in spite of the attempts of Pilate to placate the mob, the washing of the hands by Pilate, and then the verse 25: "Then answered all the people, and said, 'His blood be on us, and on our children'", concerning which the witness



stated that that single verse had been the cause of more anti-Jewish riots throughout the ages than anything else in history [R. 52-53].

On the basis of his experience as a teacher of Jewish children in religious subjects, both in New York and in Gratz College, Philadelphia, Dr. Grayzel gave the opinion that such material from the New Testament, particularly that having to do with the trial and the crucifixion of Jesus, was capable of being explained to Jewish children in such a way as to do no harm but if merely read without explanation, it would be, and in his specific experience with children had been, psychologically harmful to the child and a divisive force within the social media of the school [R. 59].

Dr. Grayzel also acknowledged that there were excerpts from the New Testament which were not objectionable but when counsel for the School District suggested the story of the Good Samaritan,<sup>2</sup> as an example, the witness emphatically stated that the story was deliberately tampered with when inserted in the New Testament and that the Samaritan had been substituted for an Israelite as "a slap at the Jews of that day who refused to join the Christian church", since it was obvious that the characters of the original story would have been representatives of the divisions of the Jewish society of the time, namely, Priests, Levites and Israelites, and so told it would have had a certain moral teaching upon which Dr. Grayzel elucidated. As presented in the New Testament, Dr. Grayzel pointed out that the Christian child could well reproach the Jewish child with the cruelty of the people from whom the Jewish child was descended; that, therefore, such a story should not be read in public schools [R. 67-68].

In addition, there were specific instances in which the King James Old Testament had, in the view of the Jewish religion, been imbued with a Christological significance [R. 48].

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2. Luke 10:30.

Dr. Grayzel also explained that there was a significant difference in attitude with regard to the respective holy books of the Jewish and Christian religions in that Judaism attaches no special virtue to the reading of the Bible *per se*, that the Jewish Holy Scriptures are source materials to be studied, and the witness gave examples of confusion which had arisen in children's minds where passages of the Bible were read without benefit of explanation or comment [R. 49].

For the appellants, Orlando English, Superintendent of Schools of Abington Township, testified that a King James Version of the Bible was purchased by the School District and one copy issued to every teacher in the district. No other versions of the Bible or other religious work or text were ever purchased [R. 127].

All of the witnesses connected with the School District agreed that the method of selection of the verses for daily reading varied. In all of the schools, including Abington Senior High School, prior to the availability of the public address system, discretion as to selection and method of selection was left to the individual teacher, some of whom delegated this function to the students [R. 97].

According to the testimony of William Young, an English teacher at Abington Senior High School in charge of something known as the "radio and television workshop", a particular practice was followed in that school, under which the approximately 30 students of the radio and television workshop did the actual reading of the Bible and the leading of the school in the saying of The Lord's Prayer. Inasmuch as Mr. Young desired the students in this class to practice in advance the reading of whatever material was to be read by them over the microphone, he himself adopted a practice of sometimes having the students practice at home with their own Bibles, out of which they were to select a section, and consequently there had been occasion when the Jewish and the Catholic students had read from their Bibles which they had brought to school for the

purpose. Only the King James Version, however, was supplied by the school. Mr. Young did not say what the Jewish students did about The Lord's Prayer, it not being included in the Jewish Holy Scriptures [R. 108-122].

The principal of the Abington Senior High School, Dr. Eugene Stull, testified that there was in use in the school, supplied by the township school authorities, a roll book for the teachers' use in keeping attendance and marking the students and in the front of this book there were suggested texts for Bible reading. Whether or not these suggestions were followed was apparently up to the teacher. The book was not an official publication of the school district or of the state but was procured from a private publisher and neither Dr. Stull nor Dr. English knew how these verses were selected by the publisher or what verses they were [R. 105-106, 129-130].

The appellants likewise presented an expert witness, Dr. Luther A. Weigle, an ordained Lutheran minister, then holding a Congregational ministry in his capacity as Dean Emeritus of the Yale Divinity School.

Dr. Weigle testified at some length as to his experience and background in matters concerning theology, all of which was within the discipline of the Protestant sects. On the basis of this experience he testified that, although one of the outstanding issues of the Protestant Reformation was the feeling of Luther, Calvin and others that there must be a return to the original Hebrew text for a new translation of the Bible, the King James Version was not a sectarian work [R. 147]. It developed, however, under questioning by the Court that in Dr. Weigle's opinion, it would be a sectarian practice if the Hebrew Scriptures, in English, were read to the exclusion of other works; and it was the witness's opinion that this might not satisfy the requirement that "The Holy Bible" be read [R. 152-153]. Subsequently on cross-examination, the witness defined his statement that the Bible was "non-sectarian" as meaning non-

sectarian among the various Christian bodies with a caveat as to the Catholic Church [R. 161.]

Of the various Christian denominations, the witness disclaimed any particular knowledge of the Catholic viewpoint but pointed out that unlike the King James Version the Catholic church put in notes to any translations made and approved by them setting forth "what the authorized theology of the Church is with respect to that particular point" [R. 161].

On direct examination Dr. Weigle had testified at considerable length on the New Revised Standard Version of the Protestant Bible and his part in the work of translating and editing this book. He acknowledged that as late as 1952, shortly after its publication, there were organizations within the Protestant church who bitterly opposed the New Revised Standard Version and that there were public burnings of books of this version [R. 156-157].

Dr. Weigle stated that he thought there was educational value in reading the King James Version, both because of the moral teachings contained therein and the high literary value, but he acknowledged on cross examination that such aspects were incidental when he endorsed the following statement from the book of which he was the author:

"The message of the Bible is the central thing, its style is but an instrument for conveying the message. The Bible is not a mere historical document to be preserved. And it is more than a classic of English literature to be cherished and admired. The Bible contains the Word of God to man. And men need the Word of God in our time and hereafter as never before." [R. 164]

And he further stated that the reason that the Bible had moral, literary and historical values was "because people have believed it, because they believe that there is something revelatory in it of what true morals are. It is

*Statement of the Case*

not simply a literary exercise but its literature has arisen out of that faith" [R. 166].

At the hearing on the amended complaint Mr. Schempp testified they had decided not to request that their children be excused from the morning devotions because, although they still felt that "the reading of the King James Version of the Bible . . . was against our particular family religious beliefs", the price which would be exacted was that of having the children labeled as "odd balls" day after day for every day of the year [R. 214]. Mr. Schempp stated that he was concerned that classmates of Roger and Joanna would so react and would tend to equate the religious difference or religious objection with atheism, which, in turn, has a number of unpopular connotations in the opinion of the Abington community. Mr. Schempp felt that it is even likely to be equated with un-Americanism and immorality. He pointed out that the pledge of allegiance to the flag follows directly upon the recitation of the Lord's Prayer [R. 214, 216].

Mr. Schempp, in giving his reason for deciding not to request an excuse for his children, also pointed out that excuse from the morning devotions would also mean missing the daily announcements which, as he said, "are very important to a child" [R. 216].

He also testified that in Abington High School a common form of punishment is exclusion from the classroom and standing in the hall, and that excuse from the Bible reading would be undistinguishable in practice from such punishment and would carry the same stigma [R. 218]. Finally, Mr. Schempp testified that he felt these necessarily distinguishing actions would set apart his children from their classmates and "would be very detrimental to the psychological well-being of our children" [R. 217].



**SUMMARY OF ARGUMENT.**

As children and parents of children in the public schools of Pennsylvania the appellees have standing to challenge the constitutionality of the Pennsylvania statute requiring the reading of ten verses of the Holy Bible each day. The evidence is, as the District Court found, that this practice is a religious ceremony and, as such, violates the establishment portion of the religious clause of the First Amendment. In order to further the design of the Pennsylvania legislature, (as set forth in the Preamble of the Bible statute) to foster "a life of honorable thought" by teaching "lessons of morality" the state has employed religion as an engine of civil policy and has aided religion. The provision of the statute permitting children to be excused from the Morning Devotions is irrelevant to the transgression upon the establishment clause.

In addition, the evidence produced by both appellants and appellees establishes, as found by the District Court, that the only Holy Bible purchased and supplied by the state to all teachers, the King James Version, is a sectarian sacred work of certain sects of Protestantism. It is also not contested that the requirement of the language of the statute, which calls for the "Holy Bible" to be read, could only be satisfied by the sacred sectarian work of some particular religious sect. Thus the statute requires, and the practice as actually carried out in the schools constitutes, an aid to one religion over all others and a preference by the state in violation of both the establishment and free exercise clauses of the First Amendment.

Irrespective of the sectarian nature of the Holy Bible, the statute aids all religions. The First Amendment is not an "equal protection" clause among religions. The statute violates the establishment clause regardless of its excuse provision.

The appellees' constitutionally guaranteed rights to the free exercise of religion includes complete freedom to



shape and mold the religious orientation of their minor children. It is of record that much that is promulgated by the King James Version is contrary to the religious beliefs and teaching of the plaintiffs and some is personally offensive to them. In order to be free of interference by the state in the religious training of their children plaintiff parents are required, by the written excuse provision, to profess publicly a belief or disbelief and to label publicly and identify their children on each day of the school year as dissenters.

The statute interferes with the free exercise of religion. The excuse provision does not eliminate the operation of influence by the State because the statute requires that appellees take public action in order to exercise their right not to attend a religious ceremony. The effect of the statute is to compel a "profession of disbelief" by a parent who requests an excuse for his children. At the same time the statute exerts pressure upon children to attend the religious ceremony. The statute injects a religious prejudice into the school by singling out those who attend and those who dissent from attending the Bible reading ceremony.

The statute is therefore unconstitutional and the decree of the District Court should be affirmed:

**ARGUMENT.****Point I.****The Practice Required by the Pennsylvania Statute  
Constitutes a Religious Ceremony or Observance.**

The statute here involved necessarily provides for a reading of the Bible as a devotional or religious act; the ritual must be done each day and only at the prescribed time. Comment is expressly barred. The terms are mandatory.

Any contention that the Bible reading in question is required merely or even primarily for its literary, historic or moral value is belied by the terms of the statute itself and the practice under it. The statute requires the reading specifically of the "Holy" Bible, and enjoins any comment upon what is read. No other book or writing, of whatever historical or literary merit, has been so singled out and made a compulsory subject of reading by teachers in the schools of Pennsylvania. No other work is presented without comment; there is no provision for excusing a child from any pedagogical exercise.

Moreover, the reading is not confined to passages of recognized literary grace, nor is any effort required or made to select passages of particular historical or moral value, even assuming agreement could be reached on the identity of such passages. The fact that the reading must be without comment necessarily means that the pedagogical benefits, if there can be any when comment and discussion are forbidden, are relegated to an inconsequential role in comparison with the religious significance of the reading.

The record establishes that the form and atmosphere of the daily reading is not that of instruction or teaching of educational material. Rather, the proceedings are formal and ceremonial, with the children instructed to be especially attentive and respectful [R. 80-81]. The reading is part of

what are commonly called "Morning Devotions," and even counsel for the School District referred to it as "devotional services" [R. 23].

The School District's expert, Dr. Weigle, testified that the literary and historical aspects of the Bible are secondary to its inherently religious significance [R. 164]. The fact cannot be escaped that the Bible is essentially a religious work, and that its reading under these ritualistic circumstances is undeniably a religious exercise.

Appellees do not and need not contend that any version of the Bible or of any other major religious work is *incapable* of being used as pedagogical source material or is disqualified from any possible use in schools.<sup>3</sup> The contention is that it is not so used in the schools of Abington Township and was not intended by the legislature to be so used. This is plainly demonstrated by the fact that the Lord's Prayer, which clearly has no significance other than the religious one, is recited immediately after the Bible reading. Not only is the practice of mass compulsory recitation of the prayer unconstitutional in itself,<sup>4</sup> but the juxtaposition of this incantation following the Bible reading removes all doubts, if any there be, as to the religious character of the Bible reading.

The legislature has required, under criminal penalty, that all children in the Commonwealth attend school. It has provided that there must be each day a religious observance by teachers who face dismissal for failure to do so.<sup>5</sup> The law under attack, therefore, is one which estab-

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3. The decree submitted by plaintiffs and adopted by the District Court expressly provides, "that nothing herein shall be construed as interfering with or prohibiting the use of any books or works as educational, source, or reference material: . . ." [R. 236].

4. There is no need for a separate provision in the decree with respect to the saying of The Lord's Prayer since it is a part of the Holy Bible and therefore within the terms of the Decree.

5. While the statute now provides no specific penalty in its own terms upon the teacher who refuses to observe its mandate, such a teacher can be dismissed for "wilful violation of the school laws." Public School Code of 1949, 24 PS § 11-1122.

lishes a mandatory religious ceremony with penalties for non-compliance.

Appellants argue that the Bible reading practice required by the statute does not require the performance of a religious act, and that listening to the reading does not constitute an "establishment of religion" within the meaning of the First Amendment (Appellants' brief, 29-31). Appellants attempt to distinguish listening to the reading of the Bible from the saying of an official prayer, held unconstitutional in *Engel v. Vitale*, 370 U. S. 421 (1962).

The attempted distinction is spurious. Whether the practice of Bible reading constitutes an "establishment of religion" certainly does not depend upon the listener's verbal participation in the practice. Certainly the official prayer in *Engel v. Vitale* would have been an "establishment of religion" had the prayers been required to be made by a teacher without any pupil participation. The listening pupil remains passive whether the teacher reads the Bible as here, or recites a prayer, or delivers a sermon. The listener's passivity in either case has not the slightest bearing on the nature of the ceremony.

### Point II.

#### **The Practice Required by the Statute Constitutes an Establishment of Religion in Violation of the Establishment Clause of the First Amendment.**

The clause of the First Amendment dealing with religion is of dual thrust,—forbidding an establishment of religion and guaranteeing the free exercise of religion. Thus it is both a limitation upon the state and an affirmation of inviolate personal right.

Herein we treat of the establishment clause, bearing in mind that the written excuse provision of the Pennsylvania statute is irrelevant to this aspect of that statute's unconstitutionality.

The establishment clause of the First Amendment forbids not merely an established church; it forbids any law

"respecting an establishment of religion." Whether its meaning and scope be fathomed by analysis of the literal words used, the stirring historical background of its adoption or review of the judicial precedents interpreting it, one must conclude that it forbids any interference, whether positive or negative, by the state in things religious. The state may neither hinder nor aid religion,—either any religion or all religions. For what the state may aid, it may hinder; what it may foster, however slightly or indirectly, it may impede grossly and directly. In short, the Amendment has been accepted as creating a wall of separation between church and state.

Appellees submit that *Engel v. Vitale*, 370 U. S. 421 (1962) controls this case. There this Court held that the action of state officials in requiring a prayer composed by them to be recited in the public schools at the beginning of each school day violated the prohibition of the First Amendment even though the prayer was denominationally neutral, and pupils who wished to do so were excused from the room while the prayer was being recited. In the language of Mr. Justice Black for the Court: "We think that the Constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by the government" (370 U. S. at 425).

Is it any more the business of government to require the reading of a prescribed number of verses from the sacred work of any religious sect as part of a ceremony opening each day's program in the public schools?

As in *Engel v. Vitale* the classrooms are used for conducting of this observance, the aegis and discipline of the state schools are employed to promulgate it, the children having been assembled to listen by the compulsion of the state's school attendance law and, finally, the state's employees, the teachers, supervise the proceedings.



There runs through appellants' argument the idea that a little ceremonial Bible reading is de minimus as an establishment. The Regents' Prayer in *Engel v. Vitale*, with its twenty-two words, was surely even lesser in magnitude, if such things can be measured. But this court said:

"It is true that New York's establishment of its Regents' Prayer as an officially approved religious doctrine of that State does not amount to a total establishment of one particular religious sect to the exclusion of all others—that, indeed, the governmental endorsement of that prayer seems relatively insignificant when compared to the governmental encroachments upon religion which were commonplace 200 years ago. To those who may subscribe to the view that because the Regents' official prayer is so brief and general there can be no danger to religious freedom in its governmental establishment, however, it may be appropriate to say in the words of James Madison, the author of the First Amendment:

"(I)t is proper to take alarm at the first experiment on our liberties. . . . Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" (370 U. S. at 436)

The application of the religious guaranty provision of the First Amendment in *Engel v. Vitale* required no extension of the "wall of separation" nor any departure from constitutional lines previously drawn by this court in a number of cases involving the public schools. Even without the guidance of *Engel v. Vitale* the District Court in the in-



stant case found *McCullum v. Board of Education* controlling (333 U. S. 203 (1948)).

In the *McCullum* case, a parent and taxpayer objected to a released time program in which religious instruction was given to public school children during school hours and on school premises; private teachers (required to be approved by the school authorities) presented this instruction in various classes arranged according to religious faith. Classes consisted of pupils whose parents signed cards requesting that their children be permitted to attend. The Court held the program unconstitutional as a violation of the principle of separation of church and state, repeating the classic summation of the "establishment" clause which it had laid down in *Everson v. Board of Education*, 330 U. S. 1 (1947):

"Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.' " (330 U. S. at 15-16; 333 U. S. at 210-11)

In *Zorach v. Clauson*, 343 U. S. 306 (1952), a different type of released time program was upheld by the Court

(three Justices dissenting). There, the religious instruction was ~~not~~ given on public school premises, and it was presented by private teachers selected by the parents or churches of the children concerned; parents desiring to participate in the program merely notified the school authorities, and their children were released at designated times. The Court based its ruling on the differences between that program and the program in the *McCullum* case:

"In the *McCullum* case the classrooms were used for religious instruction and the force of the public school was used to promote that instruction. Here, as we have said, the public schools do no more than accommodate their schedules to a program of outside religious instruction. We follow the *McCullum* case." (343 U. S. at 315)

Appellants urge that the program in *McCullum* unlike the case here was invalid because the classrooms there were used to provide formal religious instruction involving indoctrination (Appellants' brief, 28). Irrespective however of the fact that the Bible reading is without comment, it is undeniably indoctrination in the religious ideas contained in the Bible. At least it is so intended, in order, as the preamble of the act states, to foster "good moral training" and "a life of honorable thought".<sup>6</sup> As in *McCullum*, classrooms are used for the instruction, the force of the public school is used to promote it, and in addition public school teachers, the State's representatives, directly supervise it using Bibles supplied by the school district from public funds, a circumstance not present in *McCullum*. We do not think that the sweep of the *McCullum* case was limited to the circumstance that sectarian teaching was undertaken. In any event, *Engel v. Vitale* makes it clear beyond question that the element of proselytizing is not a factor in determining whether violation of the "establishment" clause exists.

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6. Act of May 20, 1913, P. L. 226.

Appellants have invented and press an argument that what is required by the First Amendment is neutrality by "the government", which, in turn, means that the traditional religious leaven should remain undisturbed. The fact that it is the legislature of Pennsylvania which has not been neutral is apparently tacitly conceded, but the rejoinder is made that this non-neutrality is traditional. So was the segregation of students on the basis of race.

This is a curious and ingenious argument. Its initial fallacy is the equation of this Court with "the government." It blithely ignores the obvious fact that what these plaintiffs are complaining about is that "the government" in the person of the legislature of Pennsylvania has not observed the "neutrality towards religion" which appellants so rightly commend. In such a situation to urge this Court to be "neutral" by not interfering is to be oblivious to the very function of the judiciary and, because one branch of the government is induced to remain supine, the non-neutrality of the other is allowed to continue. This is neutrality with a vengeance!

In sum, appellants' argument here comes down to this: Bible reading in the schools has been a traditional religious practice over a long period of years. By not disturbing this practice the government's policy of neutrality toward religion will be preserved.

This is a plea for maintaining the status quo. It apparently assumes that governmental support of Bible reading in public schools would be objectionable were it not for the fact that such support has existed for a long time. Under this view, any long established practice in our public schools violative of church-state separation ought to be sanctioned if the effect of its removal would be a disturbance of the "religious leaven."

We find no support for abdication of judicial review of laws or customs having the sanction of law but honored by age alone. On the contrary, this court has not hesitated to review and declare invalid such laws where violative of

rights protected by the Fourteenth Amendment. The "separate but equal" doctrine adopted in *Plessy v. Ferguson*, 163 U. S. 537 (1896) was acknowledged as law in the field of public education from 1896 until 1954. In finding the doctrine invalid this court felt it necessary to "consider public education in the light of its full development and its present place in American life throughout the Nation": *Brown v. Board of Education*, 347 U. S. 483, 492-93.

In this same context appellants argue that if this statute is struck down a chain of public catastrophies will inevitably ensue such as discontinuance of chaplains for the armed forces, the elimination of the rubric on our coins, courtroom oaths and the official use of the Christian calendar.

The law knows well how to deal with such a relentless pursuit of logic. Some of these matters are de minimus and courts will have no hesitancy in saying so. As to most of them, it is difficult to see how any plaintiff would have legal standing to object.

Others, like chaplains in the armed forces, are subject to countervailing rights. In that case the right of one who by compulsion of the state is separated physically from access to his church to be provided with a substitute. If chaplains were not provided, the state, through its military service laws, would be preventing the free exercise of religion.

#### A. THE STATUTE AIDS AND PREFERS ONE RELIGION TO ALL OTHERS.

Christianity is the religion favored by this act to the exclusion of all other religions. More than this, a particular sect of Christians is preferred over other sects, for while the statute does not specify which version of the Bible shall be read, manifestly any book which can qualify as a "Holy Bible" is by definition a religious book of a particular Christian faith, creed or sect. And as the record in this

case eloquently shows, invariably the version of the Bible used, if not entirely clear from the statute, will be the one favored by the dominant sect in the community, or at least that favored by the predominant sect among the personnel of the school administration.<sup>7</sup>

In *Tudor v. Board of Education of Rutherford*, 14 N. J. 31, 100-A. 2d 857 (1953), cert. den., 348 U. S. 816 (1954), the Supreme Court of New Jersey condemned as violative of the Fourteenth Amendment a school board resolution permitting the distribution of Gideon Bibles of the King James Version. Chief Justice Vanderbilt for the court stated:

"To permit the distribution of the King James version of the Bible in the public schools of this State would be to cast aside all the progress made in the United States and throughout New Jersey in the field of religious toleration and freedom." (14 N. J. at 52).<sup>8</sup>

7. The superintendent of schools of Montgomery County, in which Abington Township is located, Dr. Allen C. Harman, also teaches at the Willow Grove Methodist Church. The four superintendents of schools in Philadelphia and adjacent suburban counties are all past or present Protestant church school teachers. *The Evening Bulletin*, col. 1, p. 52, October 9, 1962.

8. A number of other state courts have considered Bible reading in the public schools where the issue was usually confined to the question whether the use of the Bible was "sectarian" within the meaning of a provision in the State Constitution prohibiting sectarian teaching or giving preference to any religious sect:

a. Upheld where participation not directly compelled by law:

*Nesle v. Hum*, 1 Ohio, N. P. 140, 2 Ohio Dec. 60 (1894); *Stevenson v. Hanyon*, 7 Pa. Dist. 585 (1898); *Lewis v. Board of Education*, 157 Misc. 520, 285 N. Y. Supp. 164 (1935), modified and affirmed, 247 App. Div. 106, 286 N. Y. Supp. 174 (1936), appeal dismissed, 246 N. Y. 490, 12 N. E. 2d 172 (1937); *Pfeiffer v. Board of Education*, 118 Mich. 560, 77 N. W. 250 (1898); *People ex rel. Vollmar v. Stanley*, 81 Colo. 276, 255 Pac. 610 (1927); in this case the court relied on the Fourteenth Amendment in holding children could not be required to attend reading against parents' wishes; *Kaplan v. Independent School Dist.*, 171 Minn. 142, 214 N. W. 18 (1927);

The practice struck down in the *Tudor* case was far less objectionable. There was no reading of the Bible in the school, the distribution was carried out privately, upon individual request of parents, and without cost to the school system. Although care was taken to insure that the children were under no pressure to apply for a Bible, yet the court concluded there was coercion in fact.

The particular Holy Bible read in the schools of Abington Township and throughout the state of Pennsylvania and the only Bible purchased by the state and supplied to all teachers is the King James Version " which is the official

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*Wilkinson v. Rome*, 152 Ga. 762, 110 S. E. 895 (1922); *Moore v. Monroe*, 64 Iowa 367, 20 N. W. 475 (1884); *Hackett v. Brooksville Graded School Dist.*, 120 Ky. 608, 87 S. W. 792 (1905); *State ex rel. Finger v. Weedman*, 55 S. W. 343, 226 N. W. 348 (1929), reading permitted but Catholic children allowed to absent themselves.

b. Upheld where legal compulsion present:

*Church v. Bullock*, 104 Tex. 1, 109 S. W. 115 (1908); *Spiller v. Inhabitants of Woburn*, 94 Mass. (12 Allen) 127 (1846); *Doremus v. Board of Education*, 5 N. J. 435, 75 A. 2d 880 (1950), app. dismissed, 342 U. S. 429 (1952); *Carden v. Bland*, 199 Tenn. 665, 288 S. W. 2d 718 (1956). In the latter case plaintiffs also urged invalidity under the First and Fourteenth Amendments. *Billard v. Board of Education*, 69 Kan. 53, 76 Pac. 422 (1904); *Donahoe v. Richards*, 38 Me. 379 (1854).

c. Held unconstitutional where compulsory:

*People ex rel. Ring v. Board of Education*, 245 Ill. 334, 92 N. E. 251 (1910); *State ex rel. Freeman v. Scheve*, 65 Neb. 853, 91 N. W. 846 (1902); *State ex rel. Weiss v. District Board*, 76 Wis. 177, 44 N. W. 967 (1890); *Herold v. Parish Board*, 136 La. 1034, 68 So. 116 (1915); Cf. *State ex rel. Dearle v. Krazier*, 102 Wash. 369, 173 Pac. 35 (1918). Compulsory attendance at reading but not the Bible reading itself was held void in *People ex rel. Vollmar v. Stanley*, 81 Colo. 276, 255 Pac. 610 (1927).

d. Held unconstitutional where not compulsory:

*People ex rel. Ring v. Board of Education*, *supra*, note; *State ex rel. Weiss v. District Board*, *supra*, note; *Herold v. Parish Board*, *supra*, note.

9. [R. 127]. The fact that under an innovation of one teacher some students may occasionally use other versions does not, of course,



Bible of certain of the Protestant sects of the Christian religion. It is a sectarian religious work, both in purpose and content. Its dedication is anti-Catholic<sup>10</sup> [R. 162]; it has been called by the Catholic Church the "chief arm of the Protestant revolt"<sup>11</sup>. The New Testament, known to Protestants as the Gospel, was written as, and for 1900 years has been, the principal vehicle for the promulgation of the Christian religion and it is, therefore, as sectarian vis-a-vis Judaism as it is possible for a religious work to be. Mere changes in language in the Revised Standard Version have within the decade led to public burnings of the new translation [R. 157].

The record contains considerable material excerpted from Encyclicals of the Popes and the Canons of the Roman Catholic church. Pope Leo XII labeled the Protestant version as a perversion and warned that the very practice followed in Abington (and according to the testimony of State Superintendent Boehm, throughout the Commonwealth), that of "indiscriminate" Bible reading may do "more harm than good". Pius IX asserted that the Protestant vernacular translations were filled with error and false explanations and degraded the Sacred Book "by using it as an instrument of proselytism". Naturally no more fertile field for proselytism could be found than the public schools. Whether, in fact, the Protestant Bible was selected for such purposes is immaterial if, in fact, the Catholics so believe. It was just such occasions for divi-

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make the practice any less sectarian, for the listening children of other faiths must then be attentive to the reader's particular version [R. 109-112].

10. The translators' dedicatory preface states that the purpose of the translation was to give "such a blow unto that Man of Sin [the Pope] as will not be healed" and "to make God's holy truth to be yet more and more known to the people, whom they [Papists] persons at home or abroad] desire still to be kept in ignorance and darkness."

11. *A Catholic Commentary on Holy Scripture* (imprimatur and nihil obstat), London, 1953, p. 11.

sive recrimination that the First Amendment was designed to avoid. The very practice of reading the Bible "without comment" has been vigorously condemned by Catholic authority which has decreed, "Believing herself to be the divinely appointed custodian and interpreter of Holy Writ, she cannot without turning traitor to herself approve the distribution of Scripture 'without note or comment' ". The same authority has asserted that the "impelling motive" of those who distribute such Bibles is their knowledge that "Private interpretation of the Scriptures" is a "fundamental fallacy".<sup>12</sup> The most disgraceful and violent episode in Philadelphia's religious history arose over what version of the Bible was to be read in the public schools.<sup>13</sup>

The record contains considerable material delineating the difference in content and concept of the King James Version as compared to the Douay (Catholic) version and the Jewish Holy Scriptures.<sup>14</sup> Furthermore, the leading faiths differ not only in their translation and interpretation of particular Biblical passages, and as to the books which together constitute their "Bible", they also differ in their

12. *The Catholic Encyclopedia*, Robert Appleton Company, New York 1907, vol. 2, p. 545.

13. In 1844 took place the infamous Nativist Riots in Philadelphia. Within the shadow of the site where stands the courthouse in which the instant case was heard, Catholic churches were burned and at least ten persons killed. The trigger of this episode was a controversy over the reading of the King James Version of The Bible to Catholic children in the public schools. Bishop Kenrick had protested and asked for equal treatment. The Native American Party, forerunner of the Know-Nothings, seized upon this protest as evidence of a Popish Plot to oust the King James Bible from the schools. Hailing The Bible as the source of all morality, "Friends of The Bible" committees were set up to oppose "naturalized and unnaturalized foreigners" who wanted to "eject it therefrom." The bloodshed followed. *Irish Emigrant and American Nativism*, Berger, Pennsylvania Magazine (1946); O'Gorman, *History of the Roman Catholic Church in the United States*, New York (1895).

14. See particularly the testimony of Dr. Solomon Grayzel, Editor of the Jewish Publication Society, and of Dr. Luther A. Weigle, Dean Emeritus of the Yale Divinity School [R. 41-74, R. 142-169].

views as to the Bible's essential character. For the Jews the Bible (i.e., the Old Testament) is a record of a covenant between God and Abraham and the latter's descendants, the children of Israel; to them the New Testament is not "sacred" literature [R. 43], in fact the concept of the divinity of Christ is blasphemous [R. 44]. For Catholics the Bible is a church document whose meaning the Church reserves the exclusive right to interpret.<sup>15</sup> For Protestants, while the essence of the Bible is the New Testament, each denomination reserves the right to interpret it to fit its own particular beliefs and practices,<sup>16</sup> and this reservation has led to exceedingly bitter controversy in this century.

The concept of an anthropomorphic God, the concept of a God of vengeance, the doctrine of the Trinity, the doctrines of the Virgin Birth, the divinity of Christ, the transfiguration, the miracles,—all these *religious* beliefs are contrary to the religious beliefs of the appellees, both parents and children. In a religiously free society, the Schempp parents should not be put to contradicting in the home what their children are subjected to in the school.

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15. Catholics hold that: "The Bible, as the inspired record of revelation, contains the word of God; that is, it contains those revealed truths which the Holy Ghost wishes to be transmitted in writing," and further, that "though the inspiration of any writer and the sacred character of his work be antecedent to its recognition by the Church yet we are dependent upon the Church for our knowledge of the existence of this inspiration. She is the appointed witness and guardian of revelation. From her alone we know what books belong to the Bible." *The Catholic Encyclopedia*, Robert Appleton Company, New York 1907, vol. 2, p. 543.

16. Many Protestant denominations appeal to the Bible to justify their own sectarian beliefs. Examples of this are too numerous to recite here but the point is illustrated by the following: The Latter Day Saints, according to an authoritative pronouncement, believe in universal "salvation". See Richard L. Evans, "What is a Mormon?", in *A Guide to the Religions of America*, ed. Leo Rosten, New York 1955, p. 95. On the other hand, the Jehovah's Witnesses say that "The reward of Spiritual life with Christ Jesus in heaven for men on earth is limited to those who inherit the Kingdom of God. In Revelation 7:4, the number of these is given as exactly 144,000." See Milton G. Henschel, "Who Are Jehovah's Witnesses?", in *A Guide to the Religions of America*, *Ibid.*, at p. 61.

The Schempps ask no more than that which one would suppose they were entitled to as citizens of the United States: the right to form and mold and guide the spiritual life of their own children themselves without interference or "help" from the State, however well-intentioned.

To brush aside these differences in belief as mere quibbles is, to say the least, an extraordinary rewriting of the records of centuries of religious conflict and bloodshed. To treat them this lightly is to denigrate the value of specific religious belief. The result is to foster a kind of colorless national, or public school creed, a religiosity without religion, a sanctimonious eclecticism cut adrift from theology.<sup>17</sup>

The characterization of the Holy Bible of any religion as "non-sectarian" is, of course, almost inevitable on the part of the hierarchy of that particular church or religion. All religions claim universality; all believe, and must believe, that their truth is truth and that the "truth" of other religions is, at best, error. Likewise, the writings or sacred texts upon which the religion founds its particular beliefs, if admitted by the adherents of the religion to be "sectarian" are thus conceded to be less than fundamental and universal in origin and application, or at least, sug-

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17. "There is an inclination in educational circles particularly to develop a kind of common, national, public-school creed which rigidly excludes any theological concern as divisive and dangerous to 'democratic unity'. Such a point of view is naturally offensive to the believer, for it misunderstands the necessarily transcendent and all-encompassing relevance of his beliefs.

\* \* \*

When men feel compelled to subscribe to religious affirmations they do not truly accept, the civil liberties problem is plain enough. Failure on the religious side is important too. The kind of religion that results from this common civic faith is a religion-in-general, superficial and syncretistic, destructive of the profounder elements of faith. Part of what drops away is the note of judgment and, more broadly, the whole transcendent dimension of religious truth." William Lee Miller, *Religion in the American Way of Life*, Fund for the Republic (1958), pp. 13, 14.

gest that the faith in question is but one of many competing and co-equal religions.<sup>18</sup>

18. No better summation of the case against the claimed non-sectarianism of The Bible can be stated than the one contained in *People ex rel. King v. Board of Education*, 245 Ill. 334, 92 N. E. 251 (1910). In that case Catholic parents complained that their children were compelled to attend public school where the King James Version of The Bible was read. The court in holding the practice invalid as sectarian instruction within the meaning of the Illinois Constitution said:

"Christianity is a religion. The Catholic church and the various Protestant churches are sects of that religion. These two versions of the Scriptures are the bases of the religion of the respective sects. Protestants will not accept the Douay Bible as representing the inspired word of God. As to them it is a sectarian book containing errors, and matter which is not entitled to their respect as a part of the Scriptures. It is consistent with the Catholic faith but not the Protestant. Conversely, Catholics will not accept King James' version. As to them it is a sectarian book inconsistent in many particulars with their faith, teaching what they do not believe. The differences may seem to many so slight as to be immaterial, yet Protestants are not found to be more willing to have the Douay Bible read as a regular exercise in the schools to which they are required to send their children, than are Catholics to have the King James' version read in schools which their children must attend. (pp. 344-345)

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"The reading of the Bible in school is instruction. Religious instruction is the object of such reading, but whether it is so or not, religious instruction is accomplished by it. The Bible has its place in the school, if it is read there at all, as the living word of God, entitled to honor and reverence. Its words are entitled to be received as authoritative and final. The reading or hearing of such words cannot fail to impress deeply the pupil's minds. It is intended and ought to so impress them. They cannot hear the Scriptures read without being instructed as to the divinity of Jesus Christ, the Trinity, the resurrection, baptism, predestination, a future state of punishments and rewards, the authority of the priesthood, the obligation and effect of the sacraments, and many other doctrines about which the various sects do not agree. Granting that instruction on these subjects is desirable, yet the sects do not agree on what instruction shall be given. Any instruction on any one of the subjects is necessarily sectarian, because, while it may be consistent with the doctrines of one or many of the sects, it will be inconsistent with the doctrine of one or more of them. The petitioners are Catholics. They are com-



The testimony of Dr. Weigle, although he was called as a witness for the defendant School District, well illustrates this point. As an ordained Lutheran minister, it is not surprising that he felt that the King James Version was non-sectarian (which he later amended to non-sectarian within the Christian religion and further qualified this by saying that he was not a Catholic and could not speak for the Catholic Church), but asserted that the reading of the Jewish Holy Scriptures would be "a sectarian practice" [R. 150, 153, 161].

A practice of having a religious ceremony which consists solely of the reading of a Bible and or the mass recitation of the Lord's Prayer is sectarian in a further sense.

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elled by law to contribute to the maintenance of this school and are compelled to send their children to it, or, besides contributing to its maintenance, to pay the additional expense of sending their children to another school. What right have the teachers of the school to teach those children religious doctrine different from that which they are taught by their parents? Why should the state compel them to unlearn the Lord's Prayer as taught in their homes and by their Church and use the Lord's Prayer as taught by another sect? If Catholic children may be compelled to read the King James' version of the Bible in schools taught by Protestant teachers, the same law will authorize Catholic teachers to compel Protestant children to read the Catholic version. The same law which subjects Catholic children to Protestant domination in school districts which are controlled by Protestant influences will subject the children of Protestants to Catholic control where the Catholics predominate. In one part of the state the King James' version of the Bible may be read in the public schools, in another the Douay Bible, while in school districts where the sects are somewhat evenly divided, a religious contest may be expected at each election of school director to determine which sect shall prevail in the school. Our Constitution has wisely provided against any such contest by excluding sectarian instruction altogether from the school. (pp. 346-347)

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"... The Bible is not read in the public schools as mere literature or mere history. It cannot be separated from its character as an inspired book of religion. It is not adapted for use as a text book for the teaching, alone, of reading, of history, or of literature, without regard to its religious character." (p. 348)



Regardless of the content of the particular Bible which might be read, the practice is a reflection of a concept of bibliolatry (sometimes called monobiblicism) characteristic of the fundamentalist Protestant faiths. Neither the Jewish nor the Catholic faiths, nor the Unitarians or Society of Friends<sup>19</sup> or other such Protestant dissenters, emphasize Bible reading per se without study, comment, discussion or elucidation. In fact, distinguished Catholic authority specifically charges the concept of monobiblicism to Calvin and ascribes to this practice great significance in the strategy of the Reformation.<sup>20</sup> And the saying of a prayer, with or without Bible reading, is sectarian regardless of content, at least under the method of mass recitation employed in the schools, since it embodies both a belief in the significance and exercise of petitional prayer, and the concept of direct access of the individual to an imminent God, neither of which are by any means universally accepted by all religions or individuals.

If this statute can be upheld it would be as justifiable and consistent, for example, for the Mormons (Latter Day Saints), in areas where they predominate, to insist that the Book of Mormon, which they regard as inspired by God, be read in public schools; or for Christian Scientists to insist that Mary Baker Eddy's "Science and Health with Key to the Scriptures", which they regard as inspired, to be read; or for Swedenborgians (New Church) to insist upon the reading of writings of Emanuel Swedenborg, such as "Arcana Celestia" or "Heaven and Hell"; or for fol-

19. "Nevertheless because they are only a declaration of the fountain, and not the fountain itself, therefore they are not to be esteemed the principal ground of all truth and knowledge, nor yet the adequate primary rule of faith and manners." Robert Barclay, *The Confession of the Society of Friends, Commonly called Quakers*, A. D. 1675 (*Barclay's Apology*), Third Proposition: Concerning the Scriptures.

20. Dom Bernard Orchard, Rev. Edmund Sutcliffe, Rev. Reginald C. Fuller, Dom Ralph Russell, editorial committee, *A Catholic Commentary on Holy Scripture*, p. 11 (with imprimatur and nihil obstat), London, 1953.

lowers of Eastern Religions, of which there are many in this country (and who constitute a majority in Hawaii), to insist upon the reading of the holy books of the East such as the Confucian classics, the Buddha Scriptures and the Koran.<sup>21</sup> Today in this country there are at least 254 religious sects or denominations, including many non-Christian groups.<sup>22</sup> Under the U. S. Constitution there is or should be no difference in the principles applicable to a small minority religious group and to a large dominant religious group. The First Amendment does not select any group or type of religion for preferred treatment: *United States v. Ballard*, 322 U. S. 78, 87 (1944).

The appellants seek to meet the inherently preferential aspect of the practice under the statute by insisting upon the absence of proselytizing or indoctrination which they say follows from the "without comment" proviso. This is wrong in theory and in fact,—in theory because proselytizing is not an essential ingredient of constitutional infirmity; in fact because, as their own expert testified, the Bible is the message of God to man and the New Testament the message of Christianity. No book in all history has demonstrated a more powerful ability to indoctrinate.

#### B. THE STATUTE AIDS <sup>2</sup>ALL RELIGIONS.

We have stated at considerable length our reasons for contending this statute bad as giving a clear preference to

21. The I AM cult (which has a temple in Philadelphia and members throughout the area), the conviction of whose leaders for mail fraud was reversed in *United States v. Ballard*, 322 U. S. 78, 87 (1944), would insist upon the reading of the literature written by Guy and Edna Ballard which they regard as inspired by certain celestial "ascendant masters" and delivered to the Ballards by the divine messenger, St. Germain. Although characterized as "humbug" by this Court, this cult was accorded the protection of a religion under the First Amendment.

22. According to the Yearbook of the American Churches in 1961 (National Council of Churches, 297 4th Avenue, New York), there is a total church membership of 112,226,905 persons in the United States divided into 254 bodies, including Buddhist, Eastern churches, Jewish, Roman Catholic and Protestant.

one religion. We do not however mean to suggest that its ailment would be remedied in the least degree if the words "Holy Bible" were interpreted to include only the books thereof acceptable to the Jews or if the various versions currently used by Protestants and Catholics were in some fashion made available for use in public schools without discrimination, nor indeed would it vary the case one bit if this statute were widened to include the "holy" books of every religious group that claims adherents in the United States today; this Court has made clear beyond quibble that the state may not "aid all religions" any more than it may prefer one over another.

This Court's classic declaration in the *Everson* case was the fruit of long and careful historical research into the evolution and meaning of the religion clause of the Amendment and its announcement has since become the most authoritative exposition of that meaning. Within a year after the *Everson* decision was handed down, the Court was called upon in the *McCullum* case to repudiate this interpretation of the First Amendment, and this the Court refused to do. On the contrary, it went out of its way to repeat in full the detailed meaning of the Amendment set forth in the *Everson* case. It reaffirmed that interpretation and held the Illinois released time program unconstitutional, expressly stating that it made no difference that the aid was non-preferential and non-discriminatory. Again in *Zorach v. Clauson*, *supra*, this Court reaffirmed its adherence to this view, unambiguously stating that "government cannot finance religious groups" whether preferentially or otherwise. Finally, there is recent reaffirmance in *Engel v. Vitale*.

The First Amendment is thus not an "equal protection" clause among religions; it was framed to meet the demands of the states for an express and absolute prohibition against government power to deal with religion in any form or manner. To uphold such a statute as the present one would be to run directly in the face of the

constitutional prohibition, and to ignore the clear, unequivocal expressions of the Supreme Court in *Everson*, *McCullum*, and *Engel*.

Perhaps none of the provisions of the Bill of Rights are so illuminated by study of the immediate history behind their adoption as the clause which is involved in this case. We refer to the fight against the Assessment Bill in the legislature of Virginia during 1784 and 1785. This bill was designed to support religion in general; each taxpayer having the privilege of selecting the church which should receive his share of the tax *or*, if he preferred, his share could be designated by him for education. Thus there was neither overt preference for one sect over another nor enforced contribution to some church since the tax could be used for secular purposes.

However, Madison and Jefferson fought the Assessment Bill, were ultimately successful and, in the succeeding legislature, there was passed Jefferson's Bill for Establishing Religious Freedom. As part of the fight against the Assessment Bill, Madison published one of the great landmarks in the history of human freedom,—the famous *Memorial and Remonstrance*.

A complete and definitive discussion of the history of the religious clause of the First Amendment and the role of Madison and Jefferson is set forth in Justice Rutledge's fifty-seven page dissent in the *Everson* case. It is pointless here to reproduce the material contained there and summary fails to do justice to it. The full text of the Remonstrance, together with the text of the Assessment Bill itself, is printed as an appendix to that opinion. In view of Madison's subsequent draftsmanship of the religious clause of the First Amendment, the Remonstrance is more than an historical curiosity; it declares the very basis of policy upon which, a few years later, the First Amendment clause was founded.

Madison's position was that religion is wholly exempt from the cognizance of civil society and hence beyond the

power of the legislature to treat in any way—by aid or hindrance, large or small. The fact that the Bill was non-discriminatory and non-sectarian, and even the fact that in default of a designated religion the tax was destined for secular education did not eliminate the fact that the state intended to “employ Religion as an engine of civil policy.”

The preamble of the Assessment Bill stated the purposes of the Bill to be that the general diffusion of religion “hath a natural tendency to correct the morals of men, restrain their vices and preserve the peace of society”. Madison made the point that true as this might be, the state was not to employ religion for these or other civil ends.

The preamble to the act under attack in this case is strikingly similar:

“Whereas, It is in the interest of good moral training, of a life of honorable thought and of good citizenship, that the public school children should have lessons of morality brought to their attention during their school-days; . . . ”<sup>23</sup>

Thus after almost 200 years the legislature of Pennsylvania falls into the precise error that Madison and Jefferson were able to persuade the Virginia legislature to avoid.

But now that the amendment permitting excuse has been added to the statute the similarity between the Assessment Bill generally and the Pennsylvania Bible reading statute becomes ever more marked. The Assessment Bill in its final form, and the form in which it was defeated, provided that those citizens who did not care to have their tax earmarked for a particular religion could designate the tax to be used for secular education purposes. The Bill was therefore what counsel for the School District would insist upon calling a “permissive” assessment.

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23. Act of May 20, 1913, P. L. 226.

Everyone was going to be taxed and those who objected to the religious use of the tax would be permitted to avoid participation in the support of religion, just as in the amended statute, the Morning Devotions are going to take place, but provision is made for avoidance of participation in them.

This feature should no more serve to save the instant statute than it did the Assessment Bill. Madison went to the heart of the matter when he argued that this was state aid of religion and hence an establishment whether it forced support from a given citizen or not.

### Point III.

#### **The Statute Interferes With the Free Exercise of Religion.**

Appellees submit that the statute violates the free exercise clause of the First Amendment because it requires that they and their children take public action in order to exercise the freedom of religion or non-religion which the Constitution guarantees to them.

Regardless of the nature of this public action, regardless of whether the consequences are pleasant or unpleasant, the action itself,—the communication to the state authorities is an act of profession of belief or disbelief and it is, per se, a violation of the First Amendment to exact it.

We have adverted to the famous statement of the meaning of the religious clause of the First Amendment as superbly put in *Everson v. Board of Education*, 330 U. S. 1 (1947). The Court said there:

“The ‘establishment of religion’ clause of the First Amendment means at least this: . . . Neither a State nor the Federal Government . . . can force . . . a person . . . to profess a belief or disbelief in any religion . . .” (330 U. S. at 15)

The legislature has now contrived a device which requires the plaintiffs in order to avoid exposure to religious material contrary to the family beliefs of plaintiffs to “profess a belief or disbelief” in a religion.



Plainly the excuse, followed by the excusing, is precisely this. It says to the state authority and to all the world, "I and my children do not believe in the religion promulgated by the Holy Bible".

This is precisely a "profession of disbelief" which the Supreme Court has said the state may not exact.

This statute violates the doctrine of the *Everson* case totally aside from whether or not other consequences are such as to constitute an inherent penalty for the profession. But there are manifestly such consequences. The action required is such as to mark and set aside from the rest of the students those who desire not to participate in a religious ceremony. The appellee Mr. Schempp testified that he was concerned lest his children be regarded as "odd balls" if they were excused from the morning ceremonies [R. 214]. This is surely a most reasonable apprehension; a view which ignored this fact would be one that ignores reality and the forces of social suasion.

As appellee Schempp testified, few are the children who would distinguish between religious dissent and irreligiousness [R. 214]. It is self-evident, and is a matter of concern to Mr. Schempp, that this is a day when children old enough to be exposed to mass media are told constantly that the epic struggle of all Western civilization is now pitched between the God-fearing West and the atheistic Communists. This side-effect is heightened by the fact that whatever arrangements are made for excusing a child, he would necessarily also be excused from the pledge of allegiance to the flag, thus further confusing his classmates as to what it is the child dissents from.

Again, though it may not loom large in the spectrum of the issues here involved, it would appear from the record that unless the excused child remained just outside the threshold of the classroom (as if it were being punished) so as to be ready to enter the room as soon as the Lord's Prayer had ended, the child would also miss the daily announcement [R: 217-218]. No child likes always to be the one in its class that never gets the word.

"That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend": *McCullum v. Board of Education*, *supra*, 333 U. S. at 227 (Concurring opinion of Mr. Justice Frankfurter).

Appellants argue that no request by these parents to have their children excused has been received, hence there is no compulsion. The argument rests on the assumption that all persons have the courage of their convictions and will act accordingly even though their action may give offense to their neighbors or to a majority of citizens in their community. Again the argument ignores reality and the forces of social suasion. The District Court pointed out its fallacy when appellants first made it: "Indeed the lack of protest may itself attest to the success and the subtlety of the compulsion": *Schempp v. School District of Abington Township*, 177 F. Supp. at 407 [R. 192].

Indeed the requirement that a parent take affirmative action to disassociate himself from the group by requesting an excuse is a greater pressure than in the *McCullum* case where affirmative action was required for association. Moreover, a mandatory requirement of school attendance for every child of school age under criminal penalties imposed on parents or other persons in loco parentis puts both parents and children in the path of the compulsion.

The grounds for rejecting any so-called "voluntary" scheme of Bible reading in public schools for those who choose to attend such reading have been well stated in a number of decisions by state courts of last resort.<sup>24</sup>

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24. *Herold v. Parish Board of School Directors*, 136 La. 1034, 1050, 68 So. 116, 121 (1915):

"And excusing such children on religious grounds, although the number excused might be very small, would be a distinct

The separation of the child from his fellows for observance of a religious exercise based on the preference of the parent tends to have a detrimental effect on the child. For the child is torn between an impulse to obey the parents' wishes and the pressure to conform to his group. If the child yields to this pressure, the result is disobedience; a loss of respect for the parent and interference with the parent's right to control in matters of religion. On the other hand, if the child obeys the parent, he suffers a loss of standing in his group.

Hence, this act makes possible a divisive controversy over a religious observance between the parent and the child, between the child and his fellows, between the parent and the school or between the parent who disapproves and

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preference in favor of the religious beliefs of the majority and would work a discrimination against those who were excused. The exclusion of a pupil under such circumstances puts him in a class by himself; it subjects him to a religious stigma; and all because of his religious belief. Equality in public education would be destroyed by such act, under a Constitution which seeks to establish equality and freedom in religious matters. The Constitution forbids that this shall be done."

*State ex rel. Weiss v. District Board*, 76 Wis. 177, 199-200, 44 N. W. 967, 975 (1890):

"When a small minority of the pupils in the public school is excluded, for any cause, from a stated school exercise, particularly when such cause is apparent hostility to the Bible which a majority of the pupils have been taught to revere, from that moment the excluded pupil loses caste with his fellows, and is liable to be regarded with aversion and subjected to reproach and insult. But it is a sufficient refutation of the argument that the practice in question tends to destroy the equality of the pupils which the constitution seeks to establish and protect, and puts a portion of them to serious disadvantage in many ways with respect to the others."

*People ex rel. Ring v. Board of Education*, 245 Ill. 334, 351, 92 N. E. 251, 256 (1910):

"The exclusion of a pupil from this part of the school exercises in which the rest of the school joins, separates him from his fellows, puts him in a class by himself, deprives him of his equality with the other pupils, subjects him to a religious stigma and places him at a disadvantage in the school, which the law never contemplated."

those parents who approve of the law. The result is an injection of religious prejudice tending to subvert the unity basic to an educational system which professes to train good citizens, how to live together in a pluralistic society. Discrimination, whether based on religious belief or on race or color, destroys equality in public education.

It is this singling out, this identification, this distinguishing between who believes and who dissents, which is at the root of the prescription that the state may not require a profession of belief or disbelief in any religion.

### CONCLUSION.

The American solution of a religiously pluralistic society is unique. It is not the solution of secularism: observers of the American scene from de Tocqueville to the most recent Gallup poll remark upon the high proportion of church membership and attendance. This solution has avoided the anti-clericalism and aggressive secularism which has generally characterized Western European societies. The tradition is not merely the Judeo-Christian tradition insulated and diluted with the secular humanism of rationalist enlightenment of the 18th Century. Nor is it quite this rationalism with its secular humanism infused with religion. For inherent in it is the concept of the state of *limited* authority and concerns, a state which is a means, not an end, and which does not assert itself as being the *Whole*.

The wall of separation doctrine implies not antagonism to religion, on the contrary it is the apotheosis of deference by Caesar to God, for it places such matters utterly beyond the ambit of civil power.

"The First Amendment leaves the Government in a position not of hostility to religion but of neutrality

The philosophy is that if government interferes in matters spiritual, it will be a divisive force." *Engel v. Vitale*, 370 U. S. at 443; concurring opinion of Mr. Justice Douglas.

*Conclusion.*

The Pennsylvania statute and the practice under it is unconstitutional.

The judgment and decree of the District Court should be affirmed.

Respectfully submitted,

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WAYLAND H. ELSBREE,

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Dated: February 1, 1963.

FEB 18 1963

IN THE

**Supreme Court of the United States**

DAVIS, CLERK

October Term, 1962

Nos. 119 and 142

WILLIAM J. MURRAY III, Infant, by MADALYN E. MURRAY, his mother and next friend, and MADALYN E. MURRAY, individually,  
*Petitioners,*

vs.

JOHN N. CURLETT, President, SAMUEL EPSTEIN, Mrs. M. RICHMOND FARRING, ELI FRANK, JR., Dr. ROGER HOWELL, HENRY P. IRR, Dr. WILLIAM D. McELROY, Mrs. ELIZABETH MURPHY PHILLIPS, JOHN R. SHERWOOD, individually, and constituting the BOARD OF SCHOOL COMMISSIONERS OF BALTIMORE CITY.

**On Writ of Certiorari to the Court of Appeals of Maryland**

SCHOOL DISTRICT OF ABINGTON TOWNSHIP, PENNSYLVANIA, JAMES F. KOEHLER, O. H. ENGLISH, EUGENE STULL and M. EDWARD NORTHAM.

*Appellants.*

EDWARD LEWIS SCHEMPF, SIDNEY GERBER SCHEMPF, Individually and as Parents and Natural Guardians of ELLORY FRANK SCHEMPF, ROGER WADE SCHEMPF and DONNA KAY SCHEMPF.

**On Appeal from a District Court of Three Judges for the Eastern District of Pennsylvania**


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**BRIEF OF SYNAGOGUE COUNCIL OF AMERICA AND  
 NATIONAL COMMUNITY RELATIONS ADVISORY  
 COUNCIL AS AMICI CURIAE**


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The Pennsylvania statute requiring daily reading from the Bible in the public schools and the Baltimore school board rule requiring daily reading from the Bible or recitation of the Lord's Prayer violate the First Amendment of the United States Constitution as made applicable to the states by the Fourteenth Amendment

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IN THE  
**Supreme Court of the United States**

October Term, 1962

Nos. 119 and 142

WILLIAM J. MURRAY III, Infant, by MADALYN E. MURRAY, his  
mother and next friend, and MADALYN E. MURRAY, individually,  
*Petitioners,*

*v.s.*

JOHN N. CURLETT, President, SAMUEL EPSTEIN, Mrs. M. RICH-  
MOND FARRING, ELI FRANK, JR., Dr. ROGER HOWELL, HENRY P.  
IRR, Dr. WILLIAM D. McELROY, Mrs. ELIZABETH MURPHY PHIL-  
LIPS, JOHN R. SHERWOOD, individually, and constituting the  
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SCHOOL DISTRICT OF ARINGTON TOWNSHIP, PENNSYLVANIA, JAMES  
F. KOEHLER, O. H. ENGLISH, EUGENE STULL and M. EDWARD  
NORTHAM,

*Appellants,*

*v.s.*

EDWARD LEWIS SCHEMPF, SIDNEY GERBER SCHEMPF, Individually  
and as Parents and Natural Guardians of ELLORY FRANK SCHEMPF,  
ROGER WADE SCHEMPF and DONNA KAY SCHEMPF.

**On Appeal from a District Court of Three Judges for  
the Eastern District of Pennsylvania**

**BRIEF OF SYNAGOGUE COUNCIL OF AMERICA AND  
NATIONAL COMMUNITY RELATIONS ADVISORY  
COUNCIL AS AMICI CURIAE**



### **Interest of the Amici**

This brief is submitted on behalf of the Synagogue Council of America and the National Community Relations Advisory Council. We have sought the consent of counsel for the parties to the filing of this brief. Counsel for petitioners in No. 119 and counsel for appellees in No. 142 have consented. Counsel for respondents in No. 119 and for appellants in No. 142 have stated that they neither consent to nor oppose the filing of such a brief. A motion for leave to file such a brief was submitted to this court on January 4, 1963.

The Synagogue Council of America is a co-ordinating body consisting of the organizations representing the three divisions of Jewish religious life: Orthodox, Conservative and Reform. It is composed of:

- Central Conference of American Rabbis, representing the Reform rabbinate;

- Rabbinical Assembly, representing the Conservative rabbinate;

- Rabbinical Council of America, representing the Orthodox rabbinate;

- Union of American Hebrew Congregations, representing the Reform congregations;

- Union of Orthodox Jewish Congregations of America, representing the Orthodox congregations;

- United Synagogue of America, representing the Conservative congregations.

The National Community Relations Advisory Council is a policy-forming and coordinating body for national and local Jewish organizations concerned with community rela-

tions. The constituent organizations of the Council, joining in this brief, include, in addition to the congregational bodies mentioned above:

- American Jewish Congress
- Jewish Labor Committee
- Jewish War Veterans of the United States

and the 57 local Jewish Community Councils, covering most of the major cities in the United States, listed in the margin.\*

\* Jewish Welfare Fund of Akron; Albany Jewish Community Council; Atlanta Jewish Community Council; Federation of Jewish Charities of Atlantic City, N. J.; Baltimore Jewish Council; Jewish Community Council of Metropolitan Boston; Jewish Federation of Broome County, N. Y.; Community Relations Committee of the Jewish Federation of Camden County, N. J.; Jewish Community Federation, Canton, Ohio; Central Florida Jewish Community Council; Cincinnati Jewish Community Relations Committee; Jewish Community Federation, Cleveland, Ohio; United Jewish Fund and Council of Columbus, Ohio; Connecticut Jewish Community Relations Council; Jewish Federation of Delaware; Jewish Community Council of Metropolitan Detroit; Eastern Union County, N. J.; Jewish Community Council; Jewish Community Council of Easton and Vicinity; Erie Jewish Community Welfare Council; Jewish Community Council of Essex County, New Jersey; Jewish Community Council of Flint, Mich.; Jewish Federation of Fort Worth, Tex.; Community Relations Committee of the Hartford (Conn.) Jewish Federation; Indiana Jewish Community Relations Council; Indianapolis Jewish Community Relations Council; Jewish Community Council, Jacksonville, Florida; Community Relations Bureau of the Jewish Federation and Council of Greater Kansas City; Kingston, N. Y.; Jewish Community Council; Conference of Jewish Organizations, Louisville, Ky.; Jewish Community Relations Council of Memphis; Milwaukee Jewish Council; Jewish Community Relations Council of Minnesota; Nashville Jewish Community Council; Jewish Federation of New Britain, Conn.; New Haven Jewish Community Council; Norfolk Jewish Community Council; Jewish Community Relations Council of Oakland, Calif.; Jewish Community Council of Paterson, N. J.; Jewish Community Council of Peoria, Ill.; Jewish Community Council,

The organizations affiliated with the Synagogue Council of America and the National Community Relations Advisory Council include in their membership the overwhelming majority of Americans affiliated with Jewish organizations.

The organizations submitting this brief are committed to the belief that the absolute separation of church and state is the surest guaranty of religious liberty and has proved of inestimable value both to religion and to the community generally. We believe also that above all other institutions our public schools must be kept free of sectarian strife and involvement in religious practices and teachings.

For these and other reasons, we submitted a brief in *People v. McCollum v. Board of Education of Champaign, Ill.*, 333 U. S. 203 (1948), and in *Engel v. Vitale*, 370 U. S. 421 (1962). Because the decisions under review here concern the continued validity of the principles declared in *McCollum* and reaffirmed in *Engel*, we have applied for leave to submit this brief *amici curiae*.

Perth Amboy, N. J.: Jewish Community Relations Council of Greater Philadelphia; Jewish Community Relations Council, Pittsburgh; Jewish Federation of Portland, Maine; Jewish Community Council, Rochester, N. Y.; Jewish Community Relations Council of St. Louis; Community Relations Council of San Diego; San Francisco Jewish Community Relations Council; Jewish Community Council, Schenectady, N. Y.; Scranton-Lackawanna Jewish Council; Jewish Community Council of Toledo; Jewish Federation of Trenton; Tulsa Jewish Community Council; Jewish Community Council, Utica; Jewish Community Council of Greater Washington (D. C.); Jewish Federation of Waterbury; Wyoming Valley Jewish Committee; Jewish Community Relations Council of the Jewish Federation of Youngstown, Ohio.

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## Statement of the Cases

In the *Murray* case (No. 119), this Court granted certiorari to review a decision of the Maryland Court of Appeals which, by a vote of 4-to-3, upheld the constitutionality of a Rule of the Board of School Commissioners of Baltimore City directing that each public school "shall be opened by the reading, without comment, of a chapter in the Holy Bible and or the use of the Lord's Prayer." The Rule further provides that the Douay (Catholic) version "may be used by those pupils who prefer it."

The *Schempp* case (No. 142) presents an appeal from a federal district court of three judges, convened pursuant to 28 U. S. C. Section 2284, which declared unconstitutional and enjoined the further enforcement of a Pennsylvania statute providing that "At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each day, by the teacher in charge." By amendment which became effective in December, 1959, the statute had been modified to provide that "Any child shall be excused from such Bible reading or attending such Bible reading upon the written request of his parent or guardian."

In both cases, the basis for the challenge to the constitutionality of the rule or statute is substantially the same: In each case it was asserted that the practice provided for violated the First Amendment's guaranty of religious freedom, its ban on laws respecting an establishment of religion, and the Fourteenth Amendment's guaranty of the equal protection of the laws.

## **Constitutional Provisions Involved**

The First Amendment to the United States Constitution provides in part: -

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

The first section of the Fourteenth Amendment to the United States Constitution provides in part:

" . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## **Summary of Argument**

Both the establishment and the free exercise aspects of the First Amendment are applicable to the States. Under the former clause, a State-sponsored practice is unconstitutional not only if it aids one religion or prefers one religion over another, but also if it aids all religions or if it forces persons to profess a belief or disbelief in religion or punishes them for entertaining or professing religious beliefs or disbeliefs. A State-sponsored religious practice which confers official sanction on the religious literature or liturgy of a particular faith violates the no-establishment clause in that it prefers one religion over others. But even if the practice could be deemed non-sectarian, it would nevertheless be unconstitutional as an aid to all religions.

A State-sponsored religious practice which is in fact not voluntary in its operation violates both the establishment and free exercise clauses. A statutory provision or departmental regulation permitting children to be excused from participation does not in reality make participation truly voluntary. However, even if it did, the practice would still be unconstitutional under the no-establishment clause of the First Amendment.

The fact that a religious practice in the public schools is of long standing does not make it constitutional. Even if the long duration of the practice could otherwise be deemed in the nature of a practical construction, it is of no evidentiary value where the constitutionality of the practice has been continually challenged almost since it was instituted.

Measured by these standards, neither of the practices challenged in the cases before this Court can stand. This conclusion is reinforced by the recent decision of this Court in the *Engel* case.

Invalidation of State-sponsored devotional reading of the Bible does not exclude the Bible from the public schools, nor does it preclude its study as a secular subject. Similarly, invalidation of the Baltimore regulation for the collective recitation of the Lord's Prayer would not affect any right of individual children to engage in private or individual prayer of their own choice during public school hours in a manner which does not interfere with the regular conduct of public school operations.

However, the fact that the Bible and even the Lord's Prayer may be studied in the public schools as a work of literature, or as a phase in the history of civilization or as any other aspect of secular studies, does not mean that



Bible reading as a devotional act or Lord's Prayer recitation can constitutionally be justified as a means of teaching moral values or of elevating ethical standards. Such an interpretation of the no-establishment clause would make it meaningless.

A judicial decision forbidding State-sponsored religious practices such as Bible reading or Lord's Prayer recitation does not manifest hostility to religion, any more than the constitutional provisions on which it is based indicated any hostility to religion on the part of the fathers of our Constitution. On the contrary, history has validated the premise upon which the First Amendment is based—that the separation of church and state is best for religion and best for the state.

## **ARGUMENT**

**The Pennsylvania statute requiring daily reading from the Bible in the public schools and the Baltimore school board rule requiring daily reading from the Bible or recitation of the Lord's Prayer violate the First Amendment of the United States Constitution as made applicable to the states by the Fourteenth Amendment.**

### **I. The Applicable Principles**

#### **A. The First Amendment and the States**

If there is any principle in constitutional law that can be said to be settled beyond further question, it is that, by virtue of the Fourteenth Amendment, the First Amendment, both in its "establishment" aspect and in its "free exercise" aspect, is a restriction upon state action no less

than federal action. *People ex rel. Everson v. Board of Education*, 330 U. S. 1 (1947); *People ex rel. McCollum v. Board of Education*, 333 U. S. 203 (1948); *Zorach v. Clauson*, 343 U. S. 306 (1952); *McGowan v. Maryland*, 366 U. S. 420 (1961); *Torcaso v. Watkins*, 367 U. S. 488 (1961); *Engel v. Vitale*, 370 U. S. 421 (1962); *Cantwell v. Connecticut*, 310 U. S. 296 (1940). Moreover, the scope of the restriction under the amendment upon State action is no less than upon federal action. *Everson, supra*; *McCollum, supra*; *Torcaso, supra*; *Engel, supra*.

The plaintiffs in both cases before this Court contend that each of the challenged practices violates both aspects of the First Amendment—the establishment aspect and the free exercise of religion. Undoubtedly, the two aspects are closely interrelated; indeed, they may be said to be two sides of a single coin. However, as each aspect is considered, different emphases emerge. Specifically, when a practice is challenged as a violation of the establishment ban, judicial attention would primarily be on whether the practice involves State aid to religion. When it is challenged as a violation of the free exercise guaranty, judicial attention would be focused primarily on compulsion.

### **B. The Meaning of the Establishment Clause**

In *Everson*, *McCollum*, *McGowan* and *Torcaso*, this Court spelled out in definitive detail the meaning of the ban on establishment of religion. In each of those cases, the Court said (see, e.g., *Everson, supra*, 330 U. S. at 15-16):

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither

can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."

It should be noted that in *Zorach v. Clauson*, *supra*, decided since the *McCullum* case, this Court expressly affirmed its holding forbidding religious teaching or practices within the public school. In the *Zorach* opinion, the Court held that *McCullum* did not prohibit the schools from adjusting their schedules to take into account the desire of some of their students to attend religious instruction off public school premises. In the words of the Court, the intention of the *Zorach* opinion is merely to uphold the authority of the school to "close its doors or suspend its operations as to those who want to repair to a religious sanctuary for worship or instruction. No more than that is undertaken here." *Id.* at 314. At the same time the Court made it plain that in all respects "We follow the *McCullum* case." *Id.* at 315. It left no doubt that under the Federal Constitution religious teachings and practices may not be

brought into public school premises. "Government," said the Court, "may not finance religious groups nor undertake religious instruction *nor blend secular and sectarian education* nor use secular institutions to force one or some religion on any persons." *Id.* at p. 314 (Italics added.)

In any event, whatever doubts may have been raised by *Zorach* were put to rest in *Engel, supra*, where this Court held specifically and unequivocally that State-sponsored religious exercises in public schools are constitutionally impermissible.

We urge that the practices under attack in the present case violate both aspects of the "religion" clause of the First Amendment. They are not merely laws which "aid one religion" and "prefer one religion over another," but also laws which at best "aid all religions" and which force persons to "profess a belief or disbelief" in religion and, by the divisiveness of their operation, punish them for "entertaining or professing religious beliefs or disbeliefs." We urge that these cases illustrate once again that under our tradition, religious freedom can best be guaranteed if the wall of separation between church and state is maintained secure and impregnable.

### **C. Compulsion and Voluntariness**

While the issue of voluntariness vs. compulsion may be relevant in respect to the attack on the practices involved in the present suits under the free exercise aspect of the cases, it is completely irrelevant in respect to the establishment aspect. Here the critical test is not compulsion (although in respect to religious practices or teachings compulsion would violate the establishment ban as well as the free exercise guaranty), but State aid to religion. Hence, even if pupil participation in the religious practices were

entirely voluntary, the First Amendment's ban on establishment would still be violated by the aid accorded religion by the State through its public school system and by State participation in religious affairs.

This is one of the vital points in these cases. In *Schmpp*, the Pennsylvania legislature amended the Bible reading statute in an effort to eliminate the compulsion issue from the controversy, and in *Murray*, the majority of the Maryland Court of Appeals relied heavily on the provision in the Rule permitting children to be excused on request. However, this Court stated clearly and unambiguously in *McColum* that it was "unnecessary to consider" the issue of voluntariness of participation since it could not affect the constitutionality of a State-sponsored religious practice (333 U. S. at 207n).

Nothing in the *Zorach* case impairs the validity of that holding. On the contrary, as has been indicated, the Court in *Zorach* went out of its way to make it clear that it was reaffirming, not overruling, *McColum*.

Thus, both *McColum* and *Zorach* make it clear that, whatever may be the law in respect to "religious exercise or instruction" in the respective religious sanctuaries of the various faiths, "religious exercise or instruction" may not be "brought to the classrooms of the public schools," irrespective of any specific proof of compulsion or other non-voluntariness.

Again, if any doubt remained after *Zorach*, it was put to rest in *Engel*. There, too, the State court had laid great emphasis on the fact that participation was voluntary since dissenting children could be excused on request. Reiterating what had been held in *McColum*, this Court expressly ruled, however, that (370 U. S. at 430):

The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not.

#### **D. *Sectarianism and Non-Sectarianism***

What we have said regarding the issue of compulsion v. voluntariness is likewise applicable to the issue of sectarianism v. non-sectarianism. We show below that the practices complained of in these suits are sectarian, i.e., they represent the teachings and beliefs of one faith which are not shared but indeed are rejected by other faiths. However, even if this were not so—even if the State-sponsored Bible reading and Lord's Prayer recitation were equally acceptable to all major faiths—they would still be unconstitutional under the principles announced in the *Everson*, *McCullum*, *Zorach* and *Engel* cases. Under those principles, government not only may not aid one religion or prefer one religion over another, but also, because of the First Amendment, may not "aid all religions." The application of this principle was spelled out in the *McCullum* case, where it was found "unnecessary to consider" the issue of sectarianism in disposing of a claim under the Establishment Clause (333 U. S. at 207n).

It is our contention that the practices complained of in these suits accord to Protestantism governmental advantages not enjoyed by Catholicism or Judaism (or indeed certain denominations within Protestantism) and to Christianity governmental advantages not enjoyed by Judaism and other non-Christian faiths. But the *McCullum* case



makes it clear that, even if Protestantism, Catholicism and Judaism and other faiths were equally accorded the favors of the public school system, the prohibitions of the First Amendment would be violated by the practices here. That amendment imposes upon the State a mandate not merely of impartiality among competing faiths, but of neutrality as between religion and non-religion, since " \* \* \* a state cannot \* \* \* aid any or all religious faiths or sects in the dissemination of their doctrines and ideals. \* \* \* " 333 U. S. at 211. (Italics added.) See also *Everson*, 330 U. S. at 18.

This conclusion was reinforced in *Torcaso*. The religious oath there in issue was entirely non-sectarian. It required merely an affirmation of a belief in the existence of God but did not impose upon anyone the obligation to define what he meant by the word "God." It thus allowed the oath to be taken (or affirmation to be made) equally by a Protestant, a Catholic or a Jew. Nevertheless, that fact did not save the oath requirement from invalidation under the First Amendment.

Here, again, *Engel* supplies the conclusive answer. The entire purpose of the formulation of a new prayer by the New York Board of Regents was to avoid the charge of sectarianism, and the fact that the prayer was "non-sectarian" or "non-denominational" was asserted as its chief virtue. Indeed, it was this effort at non-sectarianism that evoked a protest by the leaders of the Lutheran Church of Our Redeemer in Peekskill, New York, who charged that the name of Jesus had "deliberately been omitted to mollify non-Christian elements," and that the prayer "therefore is a denial of Christ and His prescription for a proper prayer. As such it is not a prayer but an abomination and a blasphemy." *Peekskill Evening Star*, January 16, 1951.

The purported non-sectarianism of the Regents' prayer did not render it constitutional. The "fact that the prayer may be denominationally neutral, . . ." this Court stated, cannot "serve to free it from the limitations of the Establishment Clause . . ." 370 U. S. at 430. The Court said further (370 U. S. at 436):

To those who may subscribe to the view that because the Regents' official prayer is so brief and general there can be no danger to religious freedom in its governmental establishment, however, it may be appropriate to say in the words of James Madison, the author of the First Amendment:

[I]t is proper to take alarm at the first experiment on our liberties. . . .

It follows, therefore, that in the present case, even if the religious programs within the public schools of Baltimore or Pennsylvania were truly non-sectarian—which, we emphatically assert, they are not—they would nevertheless be unconstitutional as a law respecting an establishment of religion as that term has been repeatedly defined and applied by this Court.

#### ***E. Establishment, Free Exercise and Compulsion***

The definitive interpretation of the establishment clause set forth in the *Everson*, *McCullum*, *McGowan* and *Torcaso* decisions, which we have quoted above, makes it clear that compulsion may effect a violation of that clause as well as of the free exercise clause. But not all compulsion necessarily violates the establishment ban; there are certain types of compulsion which will not constitute a law respecting an establishment of religion, and yet constitute one prohibiting the free exercise thereof.

The test, as elicited from the relevant decisions of this Court, is as follows: If compulsion is exercised to impel participation in *religious* conduct, it constitutes a law respecting an establishment of religion as well as one prohibiting the free exercise thereof. If, on the other hand, it impels participation in *secular* conduct, it can only be a law prohibiting the free exercise of religion.

Thus, as the *Everson*, *McCollum*, *McGowan*, and *Torcaso* cases state, it would be a violation of the establishment ban to "force . . . a person to go to . . . church . . . or . . . to profess a belief or disbelief in any religion." Going to church and professing belief in religion (or, as in the present cases, devotional reading of the Bible and recitation of the Lord's Prayer) are obviously religious acts and coerced participation establishes religion no less than it prohibits its free exercise.

On the other hand, non-polygamous marriages (*Reynolds v. United States*, 98 U. S. 145 (1878)); military training (*Hamilton v. Regents of the University of California*, 293 U. S. 245 (1934)); vaccination (*Jacobson v. Massachusetts*, 197 U. S. 11 (1905)); saluting the American flag and pledging allegiance to it (*West Virginia State Board of Education v. Barnette*, 319 U. S. 624 (1943)), are all deemed by the general community and the courts to be secular rather than religious conduct, and compulsory participation therein does not violate the ban on establishment of religion, although it may (or may not) violate the ban on laws prohibiting the free exercise of religion.

The distinction is a critical one. For if the act is secular it is within the constitutional competence of the State, and therefore the sole question remaining is whether a particular religiously-motivated person has a constitutional right under the free exercise clause to be excused from participating therein. On the other hand, if the conduct is re-

ligious, then it is outside the competence and jurisdiction of the State or its instrumentalities, and even if participation were not compulsory the conduct would be unconstitutional.

It is clear from this that the fact that the Baltimore Rule and the Pennsylvania statute provide for the excusing of children from participation does not affect the invalidity of either under the establishment bar of the First Amendment.

#### ***F. The Fiction of Voluntariness***

It may be doubted that any action of an individual in respect to his government can be said to be truly voluntary. How many citizens will refuse to give their names to an inquiring policeman even though the policeman may have no basis in law for asking the question? Thomas Jefferson recognized this when, in a letter written on January 23, 1808, to Rev. Samuel Miller, he explained his refusal to issue a Presidential proclamation for prayer or fasting on the ground that any such official action must carry to those who disregard it "some degree of proscription perhaps in public opinion." 11 Writings of Jefferson, Monticello, ed., 428-429.

This fact, too, was clearly recognized by this Court in *Engel*, when it said (370 U.S. at 431):

When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.

Whatever may be the case in respect to adults, where children compelled by law to attend school are concerned

it is completely unrealistic to suggest that their participation in a religious exercise, sponsored, approved and conducted by the public school authorities, is purely voluntary. This was recognized by the four Justices joining in the concurring opinion of Mr. Justice Frankfurter in the *M. Collum* case (333 U. S. at 227):

• • • That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend • • •

Other courts have recognized that the nominal privilege of non-participation in religious practices does not eliminate the element of "force or influence" or remove the punishment "for entertaining or professing religious beliefs or disbeliefs." Thus, 50 years ago, the Supreme Court of Illinois rejected the argument that pupils were free to exclude themselves from religious practices, saying that any such action by a pupil "places him at a disadvantage in the school, which the law never contemplated." *People ex rel. Ring v. Board of Education*, 245 Ill. 334, 351. Twenty years earlier, the Supreme Court of Wisconsin similarly concluded that "the excluded pupil loses caste with his fellows, and is liable to be regarded with aversion and subjected to reproach and insult." *State ex rel. Weiss v. District Board*, 76 Wis. 177, 199-200. An Iowa court came to the same necessary conclusion in *Knowlton v. Baumhauer*, 182 Iowa 691, 699-700. See also: *Kaplan v. Independent School District of Virginia*, 171 Minn. 142, 155-156, dissenting opinion.



A searching examination of the claim of voluntarism in respect to introduction of religious practices in the public school program was made in the case of *Tudor v. Board of Education of the Township of Rutherford*, 14 N. J. 31, 100 A. 2d 857, cert. denied 348 U. S. 816. There, speaking for a unanimous court, Chief Justice Vanderbilt, after examining the various authorities, overruled the contention of voluntarism on the ground that it "ignores the realities of life."

The Record in the case of *Chamberlin v. Dale County Board of Public Instruction*, now before this Court on appeal from the Supreme Court of Florida (October Term, 1962, No. 520) contains the most comprehensive consideration by qualified psychologists, psychiatrists and educators of the question whether the right to request to be excused from participation in a public school sponsored religious exercise makes such participation voluntary. The unanimous conclusion of these qualified authorities is that it does not.

### **G. Religion as a Secular Subject**

The complaints in these actions do not demand, nor do the plaintiffs assert, any right to the complete exclusion of religion or reference to God from the public schools. Nothing in the Constitution of the United States requires the school authorities to remove all matter relating to religion from the school curriculum. It is not contended that, for example, the Bible may not be studied in the public schools as a work of literature, or Handel's *Messiah* as a work of music, or *The Last Supper* as a work of art. Nor is it contended that the influence of religion and religious institutions upon history may not be studied in the public



schools. No violation of the establishment ban is involved in any of these since literature, music, art, and history are all secular subjects properly within the competence of the public school teaching authorities.

The complaints in these actions are addressed to the inculcation of religious beliefs or the conducting of religious programs. It is constitutional to study the Bible as a work of literature; it is, we contend, unconstitutional to read it as an act of devotion. If the approach to the Bible or religious music or art is as an intellectual study, it is proper in the public schools; if the approach is worship or faith, it belongs in the home, church and synagogue.

This distinction was well expressed by Mr. Justice Jackson in his concurring opinion in the *McCollum* case. Agreeing with the Court's decision that released time classes on public school premises were unconstitutional, he warned against complete exclusion of religion from the curriculum, saying (333 U. S. at 235-236):

Perhaps subjects such as mathematics, physics or chemistry are or can be completely secularized. But it would not seem practical to teach either practice or appreciation of the arts if we are to forbid exposure of youth to any religious influences. . . . One can hardly expect a system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared.

It is clear that it was to this type of religious matter in the public school that Mr. Justice Jackson was referring in his remark—that "it may be doubted whether the Constitution, which, of course, protects the right to dissent, can be construed also to protect one from the embarrass-

ment that always attends non-conformity in religion, politics, behavior or dress." (333 U. S. at 233). A Jehovah's Witness child who refuses to salute the flag or pledge allegiance to it (Justice Jackson wrote the majority opinion in the *Barnette* case), a Christian Scientist child who refuses to attend the biology class, or a Jewish child who stays away from school on his religious holiday, may all suffer some embarrassment because of their exercise of their constitutionally-protected right of religious nonconformity. But since flag saluting, biology and general public school studies are all acts of secular conduct on the part of the public school authorities, there is no establishment of religion involved and hence no right to require the school authorities to eliminate the flag salute ceremony, drop the biology course or close the public schools on the Jewish Day of Atonement. Where, however, the conduct complained of is religious—as in *McCullum*, *Flag* and the present cases—there is a constitutional requirement to discontinue that conduct. This is what Mr. Justice Jackson clearly intended—else he would not have concurred in the decision in the *McCullum* case but would have vigorously dissented.

#### **H. Religion as a Means and an End**

On the whole, the decisions of this Court have been consistent in interpreting the meaning of the no-establishment clause. Under these decisions, the First Amendment, which merely makes explicit what is implicit in the Constitution itself, requires government in the United States to be secular. Its ends must be exclusively secular and, in achieving them, it may use only secular means. The Preamble to the Constitution sets forth the purposes

for which the new republic in the Western Hemisphere was established, all of them secular: "to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty. . . ."

When government effects its secular purposes, its action may, as an incidental by-product, affect religion, either beneficially or detrimentally—indeed, one would assume that this would generally be so—and that fact, this Court has consistently held, does not restrict government in the manner in which it effects its purposes. Thus, as in the *Everson* case, a state may seek to achieve its secular purpose of protecting children from the hazards of traffic by providing them with free transportation to the schools they attend, and the fact that an incidental by-product benefits religion by relieving parochial schools of what might otherwise be a necessary part of their budget, a majority of this Court held, does not render its action unconstitutional.

So, too, in pursuing its secular purpose of assuring to every person one day a week for rest, relaxation and family togetherness, a majority of this Court has held that the state may require businesses to close down on Sundays, even though the Christian religion, or that part of it which observes Sunday as the Sabbath, is incidentally benefitted thereby, while those faiths which observe Saturday as the Sabbath are detrimentally affected. *McGowan v. Maryland*, 366 U. S. 420 (1961); *Two Guys v. McGinley*, 366 U. S. 582 (1961); *Gallagher v. Crown Kasher Market*, 366 U. S. 617 (1961); *Braunfeld v. Brown*, 366 U. S. 599 (1961).

On the other hand, if the governmental purpose is to aid religion, its action transgresses the limits of its power prescribed by the Constitution and the First Amendment.

As this Court said in *McGowan*: "We do not hold that Sunday legislation may not be a violation of the 'Establishment' Clause if it can be demonstrated that its purpose—evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect—is to use the State's coercive power to aid religion" (366 U. S. at 453).

For that reason, this Court in *McCullum*, with only Mr. Justice Reed dissenting, invalidated a program of released time which involved "a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith" (333 U. S. at 210). For the same reason, in *Torcaso*, the Court, with no dissent, invalidated a requirement in a State constitution that all public officers, as a condition to qualification, take an oath that they believe in the existence of God.

Moreover, in pursuing secular ends, government may use only secular means. One of the arguments stated by Madison in his monumental *Memorial and Remonstrance Against Religious Assessments* in opposition to taxation for religious purposes, was that government's employment of "Religion as an engine of Civil policy . . . [is] an unhallowed perversion of the means of salvation." *II Writings of Madison* 183, 185-186. A great statesman and jurist, Jeremiah S. Black, stated that the fathers of our Constitution "built up a wall of complete and perfect partition" between church and state in order that "one should never be used as an engine for the purposes of the other." Black, *Essays and Speeches* 53 (1885).

To hold that government may employ religion as a means to effect secular ends that are properly within governmental competence would make the First Amendment meaningless. Practically every defense of religious in-

struction in public schools is expressly predicated on the not unreasonable assertion that religious education leads to morality and good citizenship. If religion could be used to achieve the obviously secular goal of morality and good citizenship, it would follow not only that religion could constitutionally be taught in the public schools, but also that tax-raised funds could be used to finance religion and religious education. Moreover, the government could reasonably find that some religions, such as Protestantism, Catholicism and Judaism, are more likely to inculcate good citizenship than others (Jehovah's Witnesses, for example) and, therefore, could aid the former and not the latter--a conclusion which this Court has expressly rejected. *Fowler v. Rhode Island*, 345 U. S. 67 (1953).

Because religion may not be employed by government as a means to achieve secular ends, this Court turned a deaf ear to the argument of the State of Maryland in *Torcas* that believers in God make better public officials than do non-believers. Again, in *Engel*, the expressed purposes of the New York Board of Regents in recommending the daily recitation of the prayer were both secular and religious. The Regents issued a "policy statement" that asserted that Americans have always been religious, that a program of religious inspiration in the schools will assure that the children will acquire "respect for lawful authority and obedience to law [and that] each of them will be properly prepared to follow the faith of his or her father, as he or she receives the same at mother's knee or father's side and as such faith is expounded and strengthened by his or her religious leaders." *N. Y. Times*, December 1, 1951. Thus, the Regents sought to achieve both a religious end and a secular end through the use of religious means. By sponsoring recitation of their prayer they sought to assure that

"each of them [public school children] will be properly prepared to follow the faith of his or her father." This is obviously a religious purpose and, therefore, beyond the constitutional competence of government. The second purpose sought to be achieved by the Regents was to assure that public school children will acquire "respect for lawful authority and obedience to law." This, of course, is a secular end, but its effectuation could not constitutionally be sought through a religious activity.

It follows from this that even if, as asserted by respondents in *Murray*, the purposes of the State sponsored Bible reading and Lord's Prayer recitation is to further moral and ethical values, that fact does not save the exercises from invalidity under the First Amendment.

***1. Long Standing Practices are not Necessarily Constitutional.***

In both cases before this Court, the practices of public school sponsored Bible reading and Lord's Prayer recitation are defended on the ground that they are of long standing. We submit that this inference of constitutionality from age is erroneous.

Extended discussion of this ground for upholding the action of the Board of Education is not necessary here. The same assertion was made in *McCullum*, *Torcaso* and *Engel*. It was also made in a different context in *Brown v. Board of Education*, 347 U. S. 483 (1954). In all cases it was rejected.

Whatever evidentiary value the long duration of a particular practice may have is entirely absent where the constitutionality of the practice has been continually challenged, often successfully. (The cases are summarized in Johnson and Yost, *Separation of Church and State*, 1948.



pp. 33-74; Boles, *The Bible, Religion and The Public Schools*, 1961, pp. 58-135; Note, 45 A. L. R. 2d 742.) It is true that in most cases the challenges were made under State constitutional provisions rather than under the First Amendment, but the reason for that was that until *Everson* it was not generally recognized that the Amendment's no-establishment clause was applicable to the States. Once the *Everson* case was decided, the challenges, whether in State or Federal tribunals, were based upon the Amendment. See e.g., *Doremus v. Board of Education*, 5 N. J. 435 (1950); *Curden v. Bland*, 199 Tenn. 665, 288 S.W. 2d 718 (1956). But whether before or after *Everson*, and whether expressly referring to the First Amendment or not, the principles upon which the practices were challenged were principles implicit in the First Amendment.

We submit, therefore, that no inference of constitutionality can be drawn from the fact that Bible reading and Lord's Prayer recitation may be of long duration in some of the States.

## II. The Specific Religious Practices

### A. Bible Reading

1. *The Fiction of Non-Sectarianism.* In both the *Schempp* and *Murray* cases, it appears that passages from the Old and New Testament are within the purview of the statutory mandate. In the *Schempp* case, the statute does not specify which version of the Bible is to be read, but the record shows that the only version purchased by the school authorities for use in compliance with the statute was the King James or Protestant version. (Jurisdictional Statement, p. 52, fn. 10.) In the *Murray* case, the Rule assumes

that the version ordinarily used will be the King James version, although it is specifically provided that the Douay or Catholic version "may be used by those pupils who prefer it." (Petition for Certiorari, pp. 4-5) (There is no provision for use of a Jewish version by Jewish children.) All the reported cases on Bible reading in which the version of the Bible used is disclosed involved the Protestant version. See, Johnson and Yost, *supra*; Boles, *supra*; Keescker, *Legal Status of Bible Reading*, U. S. Office of Educ., Bull. No. 14 (1930).

We submit that a statute providing for reading from the Holy Bible in the public schools aids and prefers the Christian religion to the extent that the reading is from the New Testament and aids and prefers Protestantism to the extent that the reading is from the King James version.

The plaintiffs' contention that the statutes herein are preferential cannot be met by arguing that the Bible is "non-sectarian." (Of course, as we have shown above, the *Everson*, *McCullum*, *Zorach* and *Engel* decisions establish that the claim of non-sectarianism is irrelevant. Nevertheless, we deem it important to point out that the claim is purely fictional.)

Characterizing the King James version of the Bible as "non-sectarian" is, we believe, an affront to adherents to the Catholic faith. A Catholic child commits a grave sin if he knowingly owns or reads from the Protestant version of the Bible. (Bouscaren and Ellis, *Canon Law, Text and Commentary* (1946), Canon 1399.) Catholic children who have received the Protestant Bible distributed by the Gideon Society in a number of schools have been directed by their

priests to return them (Religious News Service, Dec. 6, 1960), and the distribution itself has been condemned by the Catholic Church. (Catholic Bulletin, May 28, 1940.)

The sectarian nature of the Bible was considered in detail by the Supreme Court of Illinois in *People ex rel. Ring v. Board of Education, supra*. The court pointed out that reading from the Bible in public schools necessarily gave the pupils instruction in " . . . the divinity of Jesus Christ, the Trinity, the resurrection, baptism, predestination, a future state of punishments and rewards, the authority of the priesthood, the obligation and effect of the sacraments, and many other doctrines about which the various sects do not agree."

The entire non-sectarian claim is belied by the history of Bible reading legislation and litigation in this country which shows that much of it sprang from anti-Catholic prejudice in the 19th century and that it was productive of bitter controversy because of Catholic rejection of the King James version of the Bible. Beale, *History of Freedom of Teaching in American Schools* (1941), 102-103; Myers, *History of Bigotry in the United States* (1943), 176; Billington, *Protestant Crusade* (1938), 220-230, 388, 414; O'Gorman, *History of the Roman Catholic Church in the United States*, 365-360; Connors, *Church-State Relationships in Education in the State of New York* (1951), 61. See also *Commonwealth v. Cooke*, 7 Am. L. Reg. 417 (1859).

We have outgrown the period of virulent anti-Catholic prejudice. But it must not be supposed that the introduction of religious instruction and practices in the public schools does not even today bring with it inter-religious tensions, ill-feeling and acrimony. Of all places, the public

schools should not be the arena for these conflicts. Justice Frankfurter stated in the *McCollum* case: "The activity of the State is it more vital to keep out divisive forces than in its schools" (333 U. S. at 231).

That any reading from the New Testament is sectarian as far as Jewish children are concerned is hardly open to question. The record in the *Schempp* case established this conclusively. As stated in Chief Judge Biggs' opinion for a unanimous Court:

We have the testimony of expert witnesses. Dr. Solomon Grayzel testified that there were marked differences between the Jewish Holy Scriptures and the Christian Holy Bible, the most obvious of which was the absence of the New Testament in the Jewish Holy Scriptures. Dr. Grayzel testified that portions of the New Testament were offensive to Jewish tradition and that, from the standpoint of Jewish faith, the concept of Jesus Christ as the Son of God was "practically blasphemous."

The claim of non-sectarianism was considered most thoroughly and carefully in the *Tutor* case, *supra*, in which the New Jersey Supreme Court condemned use of the public schools for distribution of Bibles by the Gideon Society. On the issue of sectarianism, the Court's unanimous opinion said:

A review of the testimony at the trial convinces us that the King James version of the Gideon Bible is unacceptable to those of the Jewish faith. In this regard Rabbi Joachim Prinz testified:

The New Testament is in profound conflict with the basic principles of Judaism. It is not accepted by the Jewish people as a sacred book. The Bible of the Jewish people is the Old Testament. The New Testament is not recognized as part of the Bible.

The court then went on to find that "the King James version of the Bible is as unacceptable to Catholics as the Douay version to Protestants."

In *Chamberlin v. Dade County Board of Public Instruction*, *supra*, the record likewise shows conclusively that the New Testament, and indeed the King James Version of the Old Testament, are unacceptable to Judaism and are thus sectarian. Indeed, we know of no Rabbi or other recognized Jewish student of religion who disagrees with this conclusion.

2. *Bible Reading as an Aid to All Religions.* The defense of "non-sectarianism," even if it were based on reality rather than fiction, has no relevancy to a determination of the validity of the challenged statutes under the First Amendment. The justification of "non-sectarianism" was adopted by State courts which were required to decide whether Bible reading or prayer recitation violated State constitutional prohibitions of "sectarian" teaching or practices in the public schools.\* These cases were practically all decided before it was recognized that the Fourteenth Amendment subjected the States to the First Amendment's prohibitions of laws respecting an establishment of religion or prohibiting its free exercise. Hence, the limitations upon governmental action in the field of religion imposed by the First Amendment were deemed irrelevant and were not considered.

Today, however, State statutes providing for Bible reading in the public schools must be tested by the standard

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\* *Hackett v. Brooksville Grade School Dist.*, 120 Ky. 608 (1905); *Billard v. Board of Education*, 69 Kans. 53 (1904); *Church v. Bullock*, 104 Tex. 1 (1908); *Wilkerson v. City of Rome*, 152 Ga. App. 762 (1921); *People v. Stanley*, 81 Colo. 276 (1927); *Kaplan v. Independent School District*, 171 Minn. 142 (1927).



prescribed by the First Amendment as well as by State constitutions. Under the First Amendment, as we have shown, it make no difference that the challenged State action is "non-sectarian," i.e., non-preferential as among the religious sects.

We submit, therefore, that, even if devotional Bible reading were acceptable to the three major faiths (without according consideration to the religious convictions of other than Protestants, Catholics and Jews) and could be designated "non-sectarian," it would still fall under the ban of the First Amendment as construed and applied in the *Ererson*, *McCullum*, *Zorach* and *Engel* cases.

#### **B. The Lord's Prayer**

The decision of this Court in the *Engel* case would seem to dispose of the issue of the constitutionality of State-sponsored collective recitation of the Lord's Prayer. It has, however, been urged that the vice in the *Engel* case was that the prayer there involved had been composed by public officials and that the decision is to be interpreted to mean no more than that the First Amendment forbids only State-sponsored recitation of prayers formulated by State officials. This, we submit, is analagous to the assertion that the mere fact that a bridge collapsed under a horse does not prove that it would have collapsed under an elephant. Whether a particular prayer is composed or adopted by government officials is constitutionally immaterial. The reason the New York Regents formulated a prayer was solely so that there should be no borrowing from the liturgy of any of the faiths, thereby avoiding any accusation of sectarianism or denominationalism. The Regents' prayer is as innocuous, non-sectarian and universal as theistic prayer can be and, if such a prayer may not be recited



in the public schools, it is more than difficult to see how a Christian prayer taken from the New Testament may be.

Indeed, after the New York courts in the *Engel* case had upheld the recitation of the Regents' prayer, the State Department of Education, in a ruling handed down by its counsel on June 14, 1960, specifically ruled that the decision did not authorize the recitation of the Lord's Prayer. Since, the opinion stated, the version of the Prayer used depends on the version of the New Testament used, "it would seem to leave no doubt that the Lord's Prayer is essentially sectarian in nature under any definition of that term." The non-sectarian prayer involved in *Engel v. Vitale*, it said, had been carefully designed "to stay away from any denominational involvement."

Nevertheless, since the claim that *Engel* does not invalidate State-sponsored recitation of the Lord's Prayer has been so vigorously asserted, and since it is the Lord's Prayer which is in issue in the *Murray* case, we deem it advisable to discuss this specific prayer.

The "Lord's Prayer" is from the New Testament. It appears once in The Book of Matthew (vi, 9-13) and in somewhat shorter form in The Book of Luke (xi, 2-4). On both occasions it is spoken by Jesus.

Of foremost importance is the fact that the word "Lord" in the title of the prayer refers to Jesus, and means that this is the prayer taught to Christians by the "Lord." Hastings, *Dictionary of the Bible* (1902), p. 141. It is impossible to think of the "Lord's Prayer" as other than their most important prayer because, to them, it is the only prayer that actually came from Jesus.

The intimate connection between the Lord's Prayer and Jesus is recognized by both Catholic and Protestant

writers. Becker and Peter, eds., *Our Father* (1956), p. 46; E. F. Scott, *The Lord's Prayer*, (1951), p. 124.

An examination of the specific context of the "Lord's Prayer" indicates that it was clearly intended by Jesus to be a distinctively non-Jewish prayer. In the Sermon on the Mount, he emphasized the differences between his new teachings and the traditional Jewish religion. He gives directives and rules for conduct "stressing the contrast to the Jewish ethic and introducing a new one" (Becker and Peter eds., *op. cit.*). Again and again Jesus says, "Ye have heard that it was said by them of old time . . . But I say unto you . . ."

In addition, Jesus gave new instructions as to the manner of prayer. He said, "And when thou prayest, thou shalt not be as the hypocrites are: for they love to pray standing in the synagogues and in the corners of the streets, that they may be seen of men . . . But thou, when thou prayest, enter into thy closet, and when thou hast shut thy door, pray to thy Father which is in secret." Jewish tradition calls for congregational praying in synagogues.

In this context, we can understand the intention of Jesus in pronouncing the "Lord's Prayer." Just as he gave Christians a new manner of praying, so he gave Christians a new prayer, which would be different from Jewish prayer. Although he borrowed words and phrases from the traditional liturgy, yet their order is different, their effect is different, and, most significantly, their meaning is different. As Dr. Scott has said:

By interpreting it at any point by the Jewish parallels, we miss its meaning altogether. Jesus employed new language to convey his new ideas (*op. cit.*, p. 63).

Dr. Scott also points to the many differences in content between the "Lord's Prayer" and Jewish prayers (*op. cit.*, p. 45).

According to this eminent Protestant theologian, the phrase "Our Father" meant something very different to Jesus than it did to Jews who recited the "Avinu Shebashamayim," from which it was taken. He states that Jesus gave "a new range of meaning" to the words "hallowed be thy name." The phrase "Thy will be done" has, according to Dr. Scott, "no real parallel in the Jewish liturgies." And the idea that God will "forgive us our debts, as we forgive our debtors" is "entirely absent from Jewish prayers" (*op. cit.*, pp. 64, 83, 89, 98, 101).

In current usage, the "Lord's Prayer" is an intrinsic part of Christian worship. It has, from earliest times, been part of Christian liturgy and today constitutes the most important element of the prayers of every Christian denomination, without exception. It is recited at every service of the Protestant Church and is sometimes repeated three times in the same service (*Twentieth Century Encyclopedia of Religious Knowledge*, (1955) vol. 2, article "Lord's Prayer"). The "Our Father", in addition to being an important part of the Catholic Mass, is also a conspicuous feature of the ritual of baptism, penance and anointing the sick (Becker and Peter, eds., *op. cit.*, p. 77 ff.). In the Divine Office (prayers recited at fixed hours of the day and night by priests and others) it appears repeatedly, besides being said at the beginning and at the end. In the Monastic orders, lay brothers who knew no Latin were required to say the "Lord's Prayer" a certain number of times, often amounting to more than one hundred, a day. The "Lord's Prayer" is also an essential part

of the Roman Catechism which since 1566 has been the "official manual of popular instruction" (*Catholic Encyclopedia*, ix, p. 356; xi, p. 219; xiii, p. 121).

The centrality of the "Lord's Prayer" in Christian life has been attested to by a number of Christian writers. Sockman, *The Lord's Prayer, An Interpretation* (1947) p. 1; Fox, *The Lord's Prayer, An Interpretation* (1934) p. 9.

The American rabbinate is of the opinion that the Lord's Prayer is a Christian prayer. Of course, as has often been pointed out, its origin is Jewish. Much of what is basic in the Christian religion (as in the Mohammedan religion) has its origin in the Jewish religion; but that does not make it in its totality any less Christian or any the less unacceptable to Jews. The rabbis have uniformly stated that the recitation of the Lord's Prayer by Jewish children is inconsistent with Jewish tradition and violative of the principles of Judaism.

For these reasons, we submit, State-sponsored recitation of the Lord's Prayer in the public schools violates the First Amendment.

### III. The Issue of Hostility to Religion

We submit that a judicial decision forbidding State-sponsored religious exercises such as Bible reading or Lord's Prayer recitation does not manifest hostility to religion any more than the constitutional provision on which it is based indicated hostility to religion on the part of the fathers of our Constitution.

We recognize that the equating of opposition to religious practices in the public school with opposition to religion may unfortunately be widespread. But this does not make it true.

This brief is submitted on behalf of more than 60 Jewish organizations, including the national bodies representing congregations and rabbis of Orthodox, Conservative and Reform Judaism. The thousands of rabbis and congregations who, through their representatives, have authorized the submission of this brief can hardly be characterized as being hostile to religion. Nor can this characterization be truthfully attributed to the many Christian groups and publications which have similarly expressed opposition to State-sponsored Bible reading or prayer recitation in the public schools.

Public school sponsored Bible reading and Lord's Prayer recitation are unlawful in three of the four most populous states of the Union, California, Illinois and New York. 25 Cal. Ops. A/G 316, Op. No. 53/266 (1955); *People ex rel. Ring v. Board of Education*, 245 Ill. 334, Ill. A G Ops. 84, Op. No. 204 (1955); statement of Dr. Charles A. Brind, Counsel to the New York State Education Department, N. Y. *Times*, Sept. 26, 1962. The combined population of these three States exceeds one-fourth of the population of the entire United States. Can it be truthfully said that the governments of these States are hostile to religion?

What this Court said in *McCullum* (at pp. 211-212) is as valid today as it was in 1948:

To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not, as counsel urge, manifest a governmental hostility to religion or religious teachings. A manifestation of such hostility would be at war with our national tradition as embodied in the First Amendment's guaranty

of the free exercise of religion. For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. Or, as we said in the *Everson* case, the First Amendment has erected a wall between Church and State which must be kept high and impregnable.

A determination that the Pennsylvania statute and the Baltimore Rule violate the First Amendment's ban on establishment would not in any way infringe upon the religious liberty of children or their parents. It would not prevent any child from reading the Bible or reciting any prayer he wished during public school hours, provided of course he did not thereby interfere with the regular course and discipline of instruction. Rather than restrict religious liberty, such a determination would further it, since it would substitute freedom of individual choice for State-imposed conduct. In American tradition, religion is a matter of individual choice; the First Amendment was written because the people did not want their religious beliefs and practices to be established by law or imposed by government. Invalidating the regulations here challenged would place the responsibility for religious exercises where it properly belongs—in the home, the church, the synagogue and on the individual conscience.



### **Conclusion**

For the reasons herein stated we respectfully submit that the decision in the Pennsylvania case should be affirmed and the decision in the Maryland case should be reversed.

Respectfully submitted,

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February, 1963

MOTION FILED

FEB 22 1963

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**Supreme Court of the United States**

**OCTOBER TERM, 1962**

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No. 119<sup>a</sup>

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WILLIAM J. MURRAY, III, ETC., ET AL.,  
*Petitioners,*  
v.

JOHN N. CURLETT, PRESIDENT, ET AL., INDIVID-  
UALLY AND CONSTITUTING THE BOARD OF  
SCHOOL COMMISSIONERS OF  
BALTIMORE CITY,  
*Respondents.*

---

No. 142

---

SCHOOL DISTRICT OF ABINGTON TOWNSHIP,  
PENNSYLVANIA, ET AL.,  
v. *Appellants,*

EDWARD LEWIS SCHEMP, ET AL.,  
*Appellees.*

---

**BRIEF OF THE AMERICAN HUMANIST ASSO-  
CIATION, AS AMICUS CURIAE, AND MOTION  
FOR LEAVE TO FILE SAME**

---

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# Supreme Court of the United States

OCTOBER TERM, 1962

No. 119

WILLIAM J. MURRAY, III, Etc., *et al.*

*v.*

*Petitioners.*

JOHN N. CURLETT, President, *et al.*, Individually and  
Constituting the Board of School Commissioners of  
Baltimore City,

*Respondents.*

No. 142

SCHOOL DISTRICT OF ARLINGTON TOWNSHIP,  
PENNSYLVANIA, *et al.*

*v.*

*Appellants.*

EDWARD LEWIS SCHEMPF, *et al.*

*Appellees.*

## MOTION OF THE AMERICAN HUMANIST ASSO- CIATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The undersigned, as counsel herein for The American Humanist Association, respectfully moves this Court for leave to file a brief, as *amicus curiae*, in both of the above cases.

The American Humanist Association is a non-profit, non-political organization organized under the Laws of the State of Illinois in 1943. Its headquarters are in Yellow Springs, Ohio. Its predecessor was founded in 1928.

It is the principal organization in the United States devoted to Humanism as a specific movement of life and thought. As an approach to living, as a philosophy and a religion, Humanism is free from any belief in the supernatural and dedicates itself to the happiness of humanity on this earth through reliance on intelligence and the scientific method, democracy and social sympathy.

It publishes a magazine called "*The Humanist*". Its program is carried out through nearly 100 local chapters and affiliated groups. It has a nation-wide membership. It is linked to other groups in 21 other countries through "The International Humanist and Ethical Union." Its membership is drawn from members of liberal churches, including Unitarian and Universalist, Ethical Societies, and secular groups.

It is not attempting to form another church but to supplement and relate the Humanists in various churches and to join them with secularists in common study and fellowship.

In 1933 "A Humanist Manifesto" was issued by 34 distinguished persons, including John Dewey, Robert Morss Lovett, John Herman Randall, Jr. and Charles Francis Potter, most of whom considered themselves religious in a non-theological sense. Religion to them meant the group quest for good life and the pursuit of the ideal, but unlike traditional theistic religions that ideal was grounded in nature rather than in the supernatural. Humanists endeavor to keep the human spirit free from binding dogmas.

and creeds and to search for truths rather than "The Truth".

It firmly believes in the fundamental American doctrine of complete separation between church and state and that this principle must be maintained in its broadest aspects.

It regards the public school as one of the most democratic American civil institutions and that its idea of secular education should not be compromised by using it as an agency for religious activities or instruction. For years it has opposed Bible reading, prayers and other religious services, ceremonies and instruction in public schools. It regards such practices as unconstitutional.

It is particularly concerned, in this important case, because the legislative acts and practices complained of prefer religions that are based on a belief in God as against religions founded on different beliefs.

In *Fellowship of Humanity v. County of Alameda*, 153 Cal. App. 2d 673, 315 P. 2d 394, the Court held that an affiliate of The American Humanist Association was a religious organization and entitled to tax exemption as such, and therein the Court construed "religion" to include theistic as well as non-theistic religious groups.

It is because of the importance of this case to Humanists throughout this country, and the effect it undoubtedly will have internationally, that permission to file the accompanying *amicus curiae* brief is requested.

The attorneys for petitioners in No. 119 and for appellees in No. 142 have consented to the filing of this brief. The attorneys representing respondents in No. 119 and appellants in No. 142 have neither consented or objected to its filing.

The undersigned filed the *amicus curiae* brief on behalf of American Civil Liberties Union in *Doramus v. Board*

of *Education*, 342 U. S. 429 (1952), involving the same questions.

Respectfully submitted,

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**Supreme Court of the United States**  
**OCTOBER TERM, 1962**

No. 119

WILLIAM J. MURRY, III, Etc., *et al.*,  
*Petitioners,*

JOHN N. CURLETT, President, *et al.*, Individually and  
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*Respondents.*

No. 142

SCHOOL DISTRICT OF ARLINGTON TOWNSHIP,  
 PENNSYLVANIA, *et al.*,

*Appellants,*

EDWARD LEWIS SCHEMPF, *et al.*,

*Appellees.*

**BRIEF OF THE AMERICAN HUMANIST  
 ASSOCIATION, AS AMICUS CURIAE**

**Interest of the Amicus**

The interest of The American Humanist Association is set forth in the accompanying motion.

## Brief Statement of the Cases

### 1. *Murray v. Curlett, No. 119*

Article VI, Section 6 of the Rules of the Board of School Commissioners of Baltimore City, Maryland, provides (R. 4, 27) :

"Section. 6—Opening Exercises. Each school, either collectively ~~or~~ in classes, shall be opened by the reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer. The Douay version may be used by those pupils who prefer it. Appropriate patriotic exercises should [also] be held as a part of the general opening exercise of the school or class. *Any child shall be excused from participating in the opening exercises or from attending the opening exercises upon written request of his parent or guardian.*" (Italics added.)

The original Rule was adopted in 1905. Following a protest by petitioners (R. 3, 4) and a ruling (R. 18, 25), the Board, on November 17, 1960, amended the Rule by adding the last sentence, italicized above.

The Rule has been applied in all public schools in Baltimore. The required practice thereunder has been to read from the King James version of the Holy Bible and to recite the Lord's Prayer, as part of a daily opening exercise and ceremony (R. 4).

One petitioner, a minor, is a student at a Baltimore Junior High School, wherein such practices occur. The other petitioner is his mother, a local resident and taxpayer. Both are atheists (R. 4, 5).

Before amendment of the Rule, the student petitioner was compelled, contrary to his conscience, to attend the



opening exercises. Since then he has been excused on his mother's request (R. 4).

Petitioners brought this action for a writ of mandamus "to rescind and cancel the aforesaid Rule and to cause said teachers in Baltimore City to discontinue the practice and exercise". The facts stated in their petition (R. 3-7) are deemed true (R. 8, 37). Petitioners' claim that said Rule, inherently and as practiced, violates their freedom of religion under the First and Fourteenth Amendments of the United States Constitution and the principle of separation between church and state contained therein (R. 5).

On demurrer, the petition was dismissed by the Superior Court of Baltimore City (R. 8-17). The Maryland Court of Appeals affirmed, by a 4 to 3 decision (R. 26-46).

## **2. School District of Abington Township, Pennsylvania v. Schempp, No. 142**

Section 1516 of the Pennsylvania Public School Act of March 10, 1949, as amended December 17, 1959, provides (R. 199-200; 24 P.S. §§15-16, Supp. 1960):

"At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian."

The action was started under the original statute (R. 1-3). The amendment was effected during pendency of the action (R. 228-9). The amended statute is the subject of petitioners' supplemental complaint (R. 199-200, 229), by which, also, one of the original plaintiffs was eliminated because of graduation.

Present plaintiffs-appellees are two Schempp minor children now students at Huntington Senior High School, a public school in the School District of Abington County, Pennsylvania, and the Schempp parents, residents of said Township (R. 1, 220-1).

All appellees are Unitarians (R. 2).

Action was brought to enjoin the enforcement of said statute as amended and to declare, as unconstitutional, the statute and "the practice of causing the Holy Bible to be read and of directing the saying of the Lord's Prayer at the Abington Township Senior High School \* \* \* and to enjoin and declare unconstitutional the expenditure of funds for the purchase of Holy Bibles" (R. 5, 6).

The practice, under the amended statute, is for high school pupils to report to their "homerooms" at 8:15 A.M.; shortly thereafter, with each pupil seated "at attention", the Bible reading starts and consists of the reading, without comment, over a loud speaker, of at least ten verses of the King James version of the Bible; then the children stand and repeat, with the public address leading them, the Lord's Prayer; still standing the children then give the "Flag Salute"; they then sit down; announcements are then made, whereupon the children disperse to their first classes of the day (R. 217-218, 220-221, 230-231).

The Schempp parents decided not to request that their children be excused from the program for various reasons.

They thought that their children would be labeled "odd balls" before their teachers and classmates; the children's classmates would think of them as "atheists"; because the events of the morning exercises followed in rapid succession, the excusing of their children would probably cause them to miss the announcements, so important to the children; and they did not want the children to have to stand

in the hall outside of their homerooms, with the resultant imputation of punishment for bad conduct (R. 213-219).

The case was tried on the original complaint and statute. A three-judge Federal District Court entered judgment declaring the statute unconstitutional and enjoining its enforcement (D.C. 1959, 177 F. Supp. 398). While appeal to this Court was pending, the statute was amended. This Court then vacated the judgment and remanded the case for such further proceedings in light of the amended statute (364 U. S. 298).

Following filing of a supplemental complaint (R. 199-203) and further testimony thereunder (R. 210-28), a three-man District Court rendered a decision (R. 228-235) and entered a judgment (R. 236-37) declaring the amended statute and the practice thereunder to be in violation of the First and Fourteenth Amendments of the United States Constitution "in that it provides for an establishment of religion" (R. 235), and enjoining the enforcement thereof (R. 236).

### **The Question Presented**

The question is whether the Pennsylvania statute and the Baltimore City Rule and the respective practices thereunder, of reading a chapter or at least ten verses from the Holy Bible, without comment, and reciting the Lord's Prayer as part of the opening exercises conducted by the school authorities at the commencement of each school day in the public schools in Pennsylvania and Baltimore City, constitute a violation of the First and Fourteenth Amendments of the United States Constitution.

## ARGUMENT

### POINT I

The Pennsylvania statute and the Baltimore City Rule and the respective practices thereunder, in the public schools of Pennsylvania and Baltimore City, of reading a chapter or at least ten verses of the Holy Bible, without comment, and of reciting the Lord's Prayer are religious, sectarian exercises and instruction and violate the First and Fourteenth Amendments of the United States Constitution.

#### A. The basic applicable constitutional provisions

The First Amendment of the Federal Constitution provides in part:

"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. \* \* \*"

Under the due process clause of the Fourteenth Amendment and recent Supreme Court decisions, the "establishment" clause and "free exercise" clauses of the First Amendment are applicable to States and subdivisions thereof. Neither Congress, nor any State, or any agency, subdivision or official of the Federal or State Governments, including boards of education, can violate them. *Captwell v. Connecticut*, 310 U. S. 296 (1940); *Murdock v. Pennsylvania*, 319 U. S. 105 (1943); *Board of Education v. Baruch*, 319 U. S. 624 (1943); *Everson v. Board of Education*, 330 U. S. 1 (1947); *McCullum v. Board of Education*, 333 U. S. 203 (1948); *McGowan v. Maryland*, 366 U. S. 420 (1961).

The minimal meaning of the establishment clause has been stated, and reaffirmed, in recent decisions of this Court (*Everson v. Board of Education*, *supra*; *McCullum v. Board of Education*, *supra*; *Zorach v. Clauson*, 343 U. S. 306 (1952); *Torcaso v. Watkins*, 367 U. S. 488 (1961); *McGowan v. Maryland*, *supra*) as follows:

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organization or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.'"

In *Everson*, all members of this Court agreed to this interpretation, differing only as to its applicability therein. In *McCullum*, this Court repeated this statement and specifically declined to repudiate it as mere "dicta". In *Zorach*, this Court said "We follow the *McCullum* case." The quoted statement was reaffirmed in 1961 in the *Torcaso* and *McGowan* cases, *supra*, with an observation that it had not been repudiated, even "in part", in *Zorach*, as some had contended.

Some additional rules of law, applicable here, have been stated in those cases.

A state's tax-supported, public school buildings and system may not be used to disseminate religious doctrines or to aid any or all religious faiths. Nor may a state aid sectarian groups in providing pupils for their religious classes through the use of the state's compulsory public school machinery (*McCullum* case).

Government may not finance religious groups nor undertake religious instruction, nor blend secular and sectarian education, nor use secular institutions to force one or some religion on any person (*Zorach* case).

Neither the federal nor a state government may require a belief in God as qualification for public office or impose legal requirements which aid all religions as against non-believers or aid those religions believing in God as against those religions founded on different beliefs (*Torcaso* case).

Government, state or federal, is without power to prescribe by law any form of prayer to be used as an official prayer in carrying on any program of governmentally sponsored religious activities. Prayer is a religious activity and a state education department may not prescribe the use in its public schools of such a prayer, even if regarded by some as 'non-denominational' (*Engel* case).

### **B. Public schools are civil institutions**

The public schools of America, including those in Baltimore City and Pennsylvania, are temporal, civil institutions, set up and governed by civil authority. The principle is implicit in all public school systems that they must be under public control and secular in education.



*City of New Haven v. Town of Torrington*, 132 Conn. 194.

As stated in *Pro. v. rel. King v. Board of Education*, 245 Ill. 334, 349 (1910):

"The public school is supported by the taxes which each citizen, regardless of his religion or his lack of it, is compelled to pay. The school, like the government, is simply a civil institution. It is secular, and not religious, in its purposes. The truths of the Bible are the truths of religion, which do not come within the province of the public school."

As the Court said in the *Barnette* case, *supra*, at page 637:

"Place public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party or faction."

It has been established by many decisions that the public school system is a state institution and a department of the civil government. See 47 Am. Jur., p. 300, § 78; C.J.S., 13, p. 625; 56 C.J., p. 178; and cases cited.

The fusion or commingling of secular and religious activities by government, through its instrumentalities, especially its public schools, must be avoided. See *Zorach v. Clauson*, 343 U. S. 306, 314 (1952); and *Everson*, *supra*, majority and minority opinions.

It was early recognized that if education was to be religious, it must be carried on with religious groups and without the support of the state; and that in an educational system supported by the state, education must be secular. Separation in education was necessary to save

the public schools from being rent by religious conflicts. Separation is a requirement to abstain from fusing the functions of government and of religion. See *McCullum v. Board of Education*, 333 U. S. 203, 215-16, 231, concurring opinion, Frankfurter, J.

As Mr. Justice Rutledge pointed out in *Everson* *supra*, at pp. 44, 63:

"Two great drives are constantly in motion to abridge, in the name of education, the complete division of religious and civil authority which our forefathers made. One to introduce religious education and observances into the public schools. The other, to obtain public funds for the aid and support of various private religious schools."

**C. Reading the Bible and reciting the Lord's Prayer in these public schools is a religious ceremony or exercise, and a sectarian religious exercise**

Prayer is a religious activity. It is a "solemn avowal of divine faith and supplication for the blessings of the Almighty". *Engel v. Vitale*, 370 U. S. 421, 424 (1962). "Prayer is always worship". *People ex rel. Ring v. Board of Education*, 245 Ill. 334, 339 (1910).

The highest courts of a number of States have recognized that Bible reading, with or without comment, is religious instruction, a religious act, and religious worship. See, for example, *Peo. ex rel. Ring v. Board of Education*, 245 Ill. 334; 92 N. E. (2) 251 (1910); *State ex rel. Weiss v. District Board*, 76 Wis. 177, 194; 44 N. W. 967 (1890); *State ex rel. Finger v. Weedman*, 55 So. Dak. 343, 226 N. W. 348 (1929); *Harold v. Parish Board*, 136 La. 1034; 68 So. 116 (1915); *State ex rel. Freeman v. Schere*, 65 Neb. 853, 871, 880 (1902).

That recitation of the Lord's Prayer in a school assembly is a religious act or exercise is obvious. The Lord's

Prayer to "Our Father" is an act of worship and a petition to God. It is not a secular act or exercise.

While there is conflict in the state judicial decisions as to whether Bible reading is sectarian instruction, it seems clear, from an objective point of view, that it must be so regarded, as held in the state cases above cited.

There are different versions of the Bible, such as the Douay (Catholic) version and the King James (Protestant) version and one of these must be used in such reading. To the Catholic, the King James version is sectarian; and to the Protestant, the Douay version is sectarian. To Jews and other non-Christians, the Christian Bible, of whatever version, is sectarian, since it includes the New Testament. The Jews and other non-Christians do not recognize the New Testament to be the word of God or that Jesus Christ is divine. To Christians, the New Testament contains the highest and latest revelation of God's word and it is a discrimination against Christians not to read the New Testament, just as it would be a discrimination against Jews and other non-Christians to read the New Testament. In Louisiana and Illinois the courts have decided that the reading of the New Testament violates the religious liberty of the Jews. *Herold v. Parish Board*, *supra*; *Peo. ex rel. Ring v. Board of Education*, *supra*; Cf. *Tudor v. Board of Education of Rutherford*, 14 N. J. 31 (1953) in which the "Gideon Bible", composed of the New Testament (King James) and the Books of Psalms and Proverbs from the Old Testament, was held to be a sectarian book. See also *The Wall of Separation between Church and State*, Moehlman, Beacon Press (1951) at p. 153.

The Lord's Prayer is a sectarian prayer to those, such as the Jews, who do not recognize Jesus Christ as their

Lord. The King James version of that prayer is objectionable to Catholics because of the concluding sentence which reads "For Thine is the Kingdom, the Power and the Glory, forever".

The practice of Bible reading cannot be justified, constitutionally, on the ground that the Bible is accepted, in whole or in part, by the three great religious groups, Jewish, Roman Catholic and Protestant, or that the nation, or any state or city therein, is predominantly Christian or Protestant.\* This also ignores the fact that the large number of the Protestant sects and the differences between them have been caused primarily because of basic differences in the interpretation of the Bible.

The United States is a cosmopolitan nation made up of almost every conceivable religious preference, especially since the addition of Hawaii and Alaska. There are almost 300 denominations, alone, listed in the Year Book of American Churches in 1958, at p. 257, et seq. *Braunfeld v. Brown*, 366 U. S. 599, 606.

These cases do not involve the reading, or studying of the Bible as literature or history, or incidental allusions to the Bible or religion in the course of secular studies. Passages to be read are not selected to that end cf. Jackson, J., *Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203, 232-6. They involve the reading of a chapter or 10 or more verses of the "Holy Bible" as the word of God, in a religious exercise or ceremony conducted in an

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\* In this connection it is significant that in 1797 the United States entered into a treaty with Tripoli in which it was declared that "As the government of the United States is not, in any sense, founded on the Christian religion, \* \* \* it is declared \* \* \* that no pretext arising from religious opinion shall ever produce an interruption of the harmony existing between the two countries." Today this concept is important because of the widespread international relations of the present day United States.

atmosphere of devotion and solemnity in a school assemblage. The reading is part of "morning devotions" (R. 23, No. 142). Comment is expressly enjoined.

Being thus read as the Holy Word, and without comment, no opportunity is afforded to anyone to explain or to interpret the meaning of the passages read, or to discuss the source, history, background and context of such passages or the books of the Bible in which they occur.

It is not possible to subject such readings to the intellectual process, or to the tests of modern Biblical research; or to permit any rationalization thereof in relation to other studies in the public schools—as, for example, the story of creation as set forth in Genesis in relation to modern science, astronomy, evolution, biology, archaeology, geology or anthropology.

Of course, if such comments were permitted, they might well offend the religious sensibilities of some pupils or their parents, or raise more sectarian issues. But, without such comments or discussion, the whole atmosphere in which the reading takes place is one of religious awe, worship and ceremony.

**D. These legislative acts and practices aid one or more religions and prefer one or more religions over other religions**

The Lord's Prayer is a Christian prayer. Its use favors Christians over non-Christians and religious belief over non-religious belief. One version of the Lord's Prayer favors Protestants over Catholics, and the other version favors Catholics over Protestants. The statute and rule in question prescribe the use of the "Holy Bible". That is a designation by Christians of a book which contains the Old Testament and the New Testament. Only part of the Old Testament of this "Holy Bible" contains the books

which comprise the Holy Scriptures of the Jews. The New Testament part of the Holy Bible is objectionable and sectarian to the Jews.

The Holy Bible is regarded by Christians as the "Word of God". It is not so regarded by other religious groups.

There are various versions of the "Holy Bible", the principal ones being the King James (Protestant) version, and the Douay (Roman Catholic) version. These versions differ materially in their contents and in texts. The King James version excludes the Books of Judath, Tobias and Baruch, and the two Books of Maccabees, which are included in the Douay version.

Differences in these versions and in other versions and translations of the Bible have caused major religious controversies.

Many Protestant sects have based their peculiar form of worship or church government on the emphasis or interpretation which they give to particular parts or verses of the Bible.

It appears from the record that the King James version of the Bible was used in the Pennsylvania and Baltimore City schools. This prefers Protestants over Roman Catholics and Jews. The use of the "Holy Bible", in any version, prefers the Judeo-Christian religions over the non-Judeo-Christian religions. Manifestly, verses or chapters could be selected for reading which would be objectionable to Protestants or to Roman Catholics or to Jews, as well as to children of other religious beliefs or no beliefs.

If the Holy Bible and Lord's Prayer can be the subject of religious exercises in the public schools, there is no reason why the sacred books of other religions should not, likewise, be used in the public schools. For instance, there is no reason why the Mormons (Latter Day Saints)



should not insist that the Book of Mormon, which they regard as inspired by God, be read in the public schools; or why Christian Scientists should not insist that Mary Baker Eddy's "Science and Health with Key to the Scriptures", which they regard as inspired, be read; or why Swedenborgians (New Church) cannot insist upon the readings of writings of Emanuel Swedenborg, such as "Arcana Celestia" or "Heaven and Hell", which they regard as inspired; or why Spiritualists cannot insist upon the reading of some of the messages which they regard as God given or inspired; or why followers of Eastern religions, of which there are many in this country, cannot require the reading of the holy books of the East, such of Confucianist, Taoist, Buddhist, Hindu, Zoroastrian and Mohammedan Scriptures. (See the "Bible of the World", the Viking Press 1939). There is also no reason why the Humanists, Ethical Culturists or Atheists should not require reading of their tracts and literature in the public schools.

**E. These legislative acts and practices aid all religions against non-believers and aid those religions based on a belief in God**

The reading of the Holy Bible in the King James, Douay or other version and the recitation of the Lord's Prayer presupposes a religious belief and a religion based on a belief in God.

The Lord's Prayer is addressed to "Our Father", or "God". The "Holy Bible" is regarded by Christians as the "Word of God". It is read to the school children in these cases as "God's Word" and with the reverence, awe and authority that the words of God should carry.

Such exercises manifestly aid religion in general and one or more particular religions, in relation to non-

believers. They also prefer theistic religions over non-theistic religions.

Neither a State nor the Federal Government can constitutionally pass laws or impose requirements, which aid all religions as against non-believers, or aid those religions based on a belief in God as against those religions founded on different beliefs. *Everson v. Board of Education*, 330 U. S. 1 (1947); *McCollum v. Board of Education*, 333 U. S. 203 (1948); *Torcaso v. Watkins*, 367 U. S. 488 (1961).

As was pointed out in the *Torcaso* case, among the religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture and Secular Humanism. Cf. *Washington Ethical Society v. District of Columbia*, 101 U. S. App. D. C. 371, 249 F. 2d 427; *Fellowship of Humanity v. County of Alameda*, 153 Cal. App. 2d 673, 315 P. 2d 394. See, also, Prof. Cahn's recent article on "Government and Prayer", *New York University Law Review*, Vol. 37, No. 6, pp. 981, 993-4 (Dec. 1962) where reference is made not only to various non-theistic religions but, also, to polytheistic religions and pan-theistic religions.

**F. Government, constitutionally, cannot finance such religious exercises or use public funds or public property to aid and support such religious exercises**

Here, public property and facilities are being used to aid the religious exercises. They are conducted in classrooms of the public schools and, in one case, over the school's public address system. The State, or its agency, the School District, employs and pays the salaries of the personnel necessarily used in the conduct of these reli-

gious exercises. It maintains the schools, class rooms and other facilities necessary in carrying out those exercises.

In the *Schmupp* case, at least, the Township purchases with public funds and issues to its teachers in the schools, copies of the King James version of the Bible for use in these exercises (R. 426-S).

The daily exercises consist of the reading of a whole chapter, or at least of ten verses, of the Bible. There is no limitation on the number of verses or on the length of the chapter which may be read. Manifestly, such daily Bible readings, together with the recitation of the Lord's Prayer, consume an appreciable amount of school time, and of the time of the instructional and supervisory school personnel.

Moreover, the whole weight, prestige, authority, judicial sanction and coercive force of the civil government is put behind these practices.

That is not separation of church and state.

These practices violate the rule of law in the *Ererson* and *McCullum* and other cases that "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."

They also violate the rule of the *Zorach* case that Government may not finance religious groups or undertake religious instruction or blend secular or sectarian education.

These practices, also, are beyond all question "a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith". Not only are the State's tax-supported public school buildings

used for the dissemination of religious doctrines, but the State's compulsory education system assists and is integrated with the program of religious instruction. Such practices were condemned in the *McCullum* case. See, also, Justice Douglas' concurring opinion in *Engel v. Vitale*, 370 U. S. 421, 441-4.

**G. No hostility to religion or religious teaching would be involved in requiring the discontinuance of such practices.**

It is often argued that this Court will be showing hostility to religion if it disapproved such practices. This argument was fully answered by the Court in the *McCullum* case, 333 U. S. 203 (1948) at pages 211-212.

**H. A complete separation between the State and religion must be maintained**

This Court has repeatedly said that the establishment of religion clause erected a wall of separation between Church and State in this country which must be kept high and impregnable (*Everson* and *McCullum* cases, *supra*), and, "We have staked the very existence of our country on the faith that complete separation between the State and religion is best for the State and best for religion" (*Torcas* and *McCullum* cases, *supra*).

Madison was fully aware of what he was doing when he caused this absolute prohibition to be inserted in the Federal Bill of Rights (New York University Law Review, Vol. 36, No. 7, Nov. 1961, article by Cahn, *supra*, and authorities cited there). In his "Memorial and Remonstrance" he warned against the first, and even any little, evasions of the principle. Jefferson gave a similar warning: "Besides, the spirit of the times may alter, will

alter. Our rules will become corrupt, our people careless. . . . It can never be too often repeated, that the time for fixing every essential right on a legal basis is while our rulers are honest, and ourselves united." (Jefferson, "Notes on Virginia" (1782); Padover "The Complete Jefferson" at p. 676.)

The legislative acts and practices involved in this action breach that wall of separation. Exceptions to, and expedient evasions of, the principle will only lead to more evasions and exceptions and, eventually, to the undermining of the constitutional mandate. Separation means separation. ~~Not~~ something less—a "wall of separation", not a line easily overstepped (*McCollum supra*; Frankfurter, J., opinion at p. 231).

**I. The constitutional defects in the statutes and practices are not cured by provisions allowing students to be excused, on request, from such exercises**

Both the Baltimore City Rule and the Pennsylvania statute were amended to provide that any child might be excused from such exercises by written request of his parent. These amendments did not cure the constitutional defects.

The fact that some pupils may, upon the request of their parents be excused from participating in, or attending, these exercises, does not free the programs from the limitations of the establishment clause of the First Amendment. *Engel v. Vitale*, 370 U. S. 421, 435 (1952); *McCullum v. Board of Education*, 333 U. S. 203 (1948) and the concurring opinion of Mr. Justice Frankfurter at page 227; *Engel v. Vitale*, 370 U. S. 421, 423-4 (1952) and Footnote 2.

In several State cases, it has been held that provision for the excusing of a pupil, upon request, from participation in such exercises does not cure the constitutional defects. See *People ex rel. King v. Board of Education*, 245 Ill. 334 (1910); *Weiss v. District Board*, 76 Wis. 477 (1890); *Herold v. Parish Board*, 136 La. 1034, 68 So. 116 (1915); *Knowlton v. Baumhauer*, 182 Iowa 691, 166 N. W. 202 (1918); *Harst v. Hoegen*, 349 Mo. 808, 163 S. W. (2d) 609 (1941). See also able dissenting opinions in *Wilkinson, et al. v. City of Rome, et al.*, 152 Ga. 762, 784-5 (1921); *Kaplan v. Independent School Dist.*, 171 Minn. 142, 155-6 (1927).

## POINT II

**The attempts to force Bible reading and prayers into the public schools have created in the States many years of bitter divisions and strife. The state cases illustrate the need and reason for a strict separation of state and religion in the area of the public schools.**

The number of cases that have arisen in the States over the issue of Bible reading and prayer in the public schools indicate the strife and divisiveness that such practices cause. Most of these cases have been brought by Catholics, some by Jews, each representing a local minority religious group. Some dominant Protestant groups, in encouraging these practices, have seemingly failed to appreciate the position of minority Protestant sects, Catholics, Jews and other non-Christians, non-theists and non-believers, all of whom are required to pay taxes and children of whom attend the public schools. Their attitude might well be different if, by reason of a shift of population, such religious exercises and instruc-



tion in public schools were to consist of prayers and readings characteristic of the Catholic or Jewish faiths or of other religious groups.

Reference will be made only to a few of these cases which illustrate why it is of vital importance that the principle of separation of church and state be applied and maintained, strictly, in the field of free, tax-supported public school education.

In *Peo. ex rel. Ring v. Board of Education*, 245 Ill. 334, 92 N. E. 251 (1910), parents of children, Roman Catholics, sought mandamus to prevent the reading of the King James version of the Bible and the repetition of the Lord's Prayer in the public schools. They alleged that their Church believes the King James version to be incorrect and incomplete—and disapproves of its being read as a devotional exercise; and that such practice violated their rights under the State and Federal constitutions.

If one of the most carefully written and learned opinions on the subject—the Illinois Supreme Court, in holding such exercises to be unconstitutional, stated, *inter alia*, that they constituted "worship"; that "prayer is always worship"; that the Bible is a sectarian book and reading it constitutes religious instruction. It also held that the exclusion of a pupil from these exercises did not cure the situation but rather caused discrimination and divisiveness and proved that the exercises were sectarian and forbidden by the Constitution.

To the same general effect, also: *State ex rel. Weiss v. District Board*, 76 Wis. 177, 44 N.W. 967 (1890); *Herold v. Parish Board*, 136 La. 1034, 68 So. 416 (1915); *State ex rel. Freeman v. Schere*, 65 Neb. 853 (1902); *Board of Education v. Minor*, 23 Ohio St. Rep. 211 (1872); *State ex rel. Finger v. Weedman, et al.*, 226 N.W. 348; 55 So.

Dak. 343 (1929). Cf. *Donahue v. Richards*, 38 Mo. 376 (1854); *Spiller v. Inhabitants of Woburn*, 94 Mass. 127 (1866); *Clithero v. Showalter*, 159 Wash. 519 (1930); appeal dismissed, 284 U. S. 573; *State ex rel. Dearth v. Frazier*, 102 Wash. 369 (1918); *Wilkerson, et al. v. City of Rome, et al.*, 152 Ga. 762 (1921); *Huckett v. Brooksville Graded School-District*, 120 Ky. 608 (1905); *Billard v. Board of Education*, 63 Kans. 53 (1904); *Church v. Bullock*, 104 Tex. 1 (1908); *People v. Stanben*, 81 Colo. 276 (1927); *Kaplan v. Independent School District*, 171 Minn. 142 (1927); *Dormus v. Board of Education*, 5 N. J. 435, 75A. 2nd 880 (1950); appeal dismissed, 342 U. S. 429; *Carden v. Bland*, 199 Tenn. 665, 288 S.W. 2nd 718 (1956); *Chamberlin v. Dade County Bd. of Pub. Instruction*, 143 So. 2d 21.

This list includes most, if not all of the cases decided in the State courts, on this subject. They have been decided both ways, most of them under State constitutions. Altogether they emphasize that the use of the public schools and the compulsory education machinery for religious instruction or exercises by means of Bible reading, recitation of prayers and otherwise, has been and is the source of much bitter controversy and strife. The opinions and dissenting opinions in these cases recite the factual details and the arguments pro and con.

\* Collections and discussions of these State cases, and the State statutes involved, will be found in the following: *The Legal Status of Church-State Relationships in the United States*, by Alvin W. Johnson (1934), Minnesota University Press, at pp. 199; *Church and State in the United States*, by Stokes, Vol. II, pp. 549-572, Harper Brothers, 1950; *The American Tradition in Religion and Education*, by Butts, Beacon Press, 1950, pp. 190-197; *Church, State, and Freedom*, by Pfeffer, 1953, Beacon Press, pp. 374-391, 394-399; Vol. 63, Columbia Law Review, pp. 80-7 (January 1963), article "The Supreme Court, The First Amendment, and Religion in the Public Schools".

There is no need or justification for such continued conflict in the public schools; and the First Amendment, through the Fourteenth, was designed to prevent such conflicts by separating the spheres of religious and civil authority and activity. Religion is taught, and should only be taught, in the homes, churches, and religious schools. The State, being a civil institution, should not enter into the field of religious instruction or exercises through the facilities of its public schools, which are open to and supported by persons of all varieties of religious belief and no belief.

Education of the young is vital to the world. It is accepted general knowledge that the first eight years in the life of a human being are the most impressionable and very often the seat of problems manifesting themselves in adulthood.

"Men are not born with hatred in their blood. The infection is usually acquired by contact; it may be injected deliberately or even unconsciously, by parents, or by teachers." The divisiveness thus spawned in society and in schools, public or private, does have untold repercussions in adulthood.

Yesterday the Jews, the day before the Catholics, tomorrow the Protestants and the day after that mankind.

\* "The Foot of Prick" by Malcolm Hay, p. 3, Beacon Press, 1950.

\* A German general when asked at Nuremberg how the slaughter of millions of Jews could take place, replied "I am of the opinion that when for years, for decades, the doctrine is preached that Jews are not even human, such an outcome is inevitable." *Ibid.* p. 3.

\* "I am convinced" wrote Pierre van Paassen "that Hitler neither could nor would have done to the Jewish people what he has done \* \* \* if we had not actively prepared the way for him by our own unfriendly attitude to the Jews by the selfishness and by the anti-Semitic teachings in our churches and schools." "The Forgotten Ally" by Pierre Paassen, p. 45.

if the home, religious groups and religious schools do not make morality and ethics their real business, and keep religion out of the public schools.

Any contention or suggestion that the practice of morning devotionals and Bible readings in the public schools is not to be upset because it is long established and for fear of destroying the moral fiber of our society or educational system, falls before the decisions of this Court in desegregation cases and flies in the face of the great Emancipation Proclamation freeing American society from slavery. The principles of American democracy are paramount to such an emotional appeal. The world looks to this nation as a working example of the sacredness of an individual and his rights vis-a-vis government. Liberty and freedom have become synonymous with the American form of government; elsewhere in the world governments have commingled their secular activities with religion; in America the Constitution set up a wall between such activities. Whenever directly or indirectly, by argument, persuasion or any sort of legal legerdemain, attempts are made to scale this wall, the integrity of the wall must be maintained.

### **Conclusion**

The Pennsylvania statute and the practice thereunder, and the Baltimore city rule and the practice thereunder, are both unconstitutional under the First and Fourteenth Amendments. Pennsylvania and Baltimore city are not being neutral in their relations to believers and non-believers. They have made man's relation to his God the concern of the State. They have fused spheres of religious activity and civil authority. They are utilizing the

State's tax-supported and tax-established public school system to aid faiths and are putting the momentum of their whole public school atmosphere and system behind religious instruction. They are using tax-supported property for religious instruction and exercises. They are providing pupils for religious services and exercises through use of the State's compulsory public school machinery. They are using their state power and laws to aid some religions over others. They are using taxes raised for secular public schools to support religious activities. They are commingling religious and secular instruction in the public schools.

This is not a separation of Church and State. Separation means separation, not something less. The principle should be enforced in its full integrity. These legislative acts and practices should be struck down as being in violation of these constitutional principles.

Respectfully submitted,

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